

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 36

EARL H. McDONALD AND JOSEPH F. WASHINGTON,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 16, 1948.

CERTIORARI GRANTED APRIL 19, 1948.

APPENDIX



INDEX TO APPENDIX.

	Page
I. Pleadings, Docket Entries and Other Papers	1
1. Indictment	2
2. Minutes of Court pertaining to arraignment and plea of 'Not Guilty'	4
3. Motion for Return of Property Seized and Mo- tion to Suppress, filed September 11, 1946.	5
4. Findings of fact and conclusions of law filed October 16, 1946	6
5. Waiver of jury trial	8
6. Minutes of Court pertaining to denial of Motion and verdict of 'Guilty'	8
7. Minute entries of Court showing sentence im- posed	9
II. Excerpts from Testimony and Proceedings	10
Witnesses:	
Barbara Terry	10
Howard Ogle	16
Earl McDonald	17
Howard Ogle	19
Paul Clarke	23
Proceedings in United States Court of Appeals for the District of Columbia	28
Opinion, Miller, J.	28
Dissenting opinion, Edgerton, J.	30
Judgment	32
Designation of record	33
Clerk's certificate	34
Order allowing certiorari	35

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No: 9524.

EARL H. McDONALD, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 9525.

JOSEPH F. WASHINGTON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

**Appeal from the District Court of the United States for the
District of Columbia.**

JOINT APPENDIX.**I.****PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS.****Indictment.**

20

Filed in Open Court Aug 26 1946

District Court of the United States for the
District of ColumbiaHolding a Criminal Term
July Term. A. D. 1946.Grand Jury No. 33,133
Criminal No. 77468.Violation Sections 1501, 1502 and 1504, Title 22, D. C. Code

UNITED STATES OF AMERICA

v.

EARL H. McDONALD, JOSEPH F. WASHINGTON.

The Grand Jury charges:

On or about the twenty-second day of June, 1946, and within the District of Columbia, Earl H. McDonald and Joseph F. Washington, unlawfully, feloniously and knowingly was concerned as owners, agents and clerks and in other ways in managing carrying on promoting and advertising a certain lottery commonly known as the numbers game.

Second Count:

And the Grand Jury further charges:

On or about the twenty-second day of June, 1946, and within the District of Columbia, Earl H. McDonald and Joseph F. Washington did have in their possession, unlawfully and knowingly, certain tickets, certificates, bills, slips, tokens, papers and writings, used and to be used, and

adapted, devised and designed for the purpose of playing, carrying on and conducting a certain lottery, commonly known as the numbers game.

Third Count:

And the Grand Jury further charges:

On or about the twenty-second day of June, 1946, and within the District of Columbia, Earl H. McDonald and Joseph F. Washington knowingly, unlawfully and feloniously did set up and keep a certain table for the purpose of betting and wagering money and property upon the results of horse races.

21. Fourth Count:

And the Grand Jury further charges:

On or about the twenty-second day of June, 1946 and within the District of Columbia, Earl H. McDonald and Joseph F. Washington knowingly, unlawfully and feloniously did set up and keep a certain place for the purpose of betting and wagering money and property upon the results of horse races.

GEO. E. McNEIL

*Asst Attorney of the United
States in and for the District
of Columbia.*

A True Bill:

JOHN D. BURRAGE
Foreman.

Friday, September 6, 1946

The Court resumes its session pursuant to adjournment:
Hon. Jennings Bailey, Presiding:

Criminal No. 77468

UNITED STATES

v.

EARL H. McDONALD

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance; whereupon the defendant being arraigned upon the indictment, the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attorney the defendant is granted leave within Five (5) days to withdraw said plea and demur to, or move to quash the said indictment, or otherwise plead as he may be advised.

Criminal No. 77468.

UNITED STATES

v.

JOSEPH F. WASHINGTON

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance; whereupon the defendant being arraigned upon the indictment, the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attorney the defendant is granted leave within Five (5) days to withdraw said plea and demur to, or move to

quash the said indictment, or otherwise plead as he may be advised.

24

Filed Sep 11 1946

*Motion for the Return of Seized Property and the
Suppression of Evidence*

Earl McDonald and Joseph F. Washington hereby move this Court to direct that certain property of which they are the owners a schedule of which is annexed hereto, and which on the 22nd day of June, 1946, at premises 1608 3rd Street, N. W., Washington, D. C., was unlawfully seized and taken from them by two members of the Metropolitan Police Department, to wit, Paul Clarke and Howard Ogle, be returned to them and that if be suppressed as evidence against them in any criminal proceeding. The petitioners further state that the property was seized against their will and without a search warrant.

CHARLES E. FORD PER H. C. ALDER
Attorney for Petitioners

I hereby certify that I have this 11th day of September, 1946, personally served a copy of the foregoing motion on the United States District Attorney for the District of Columbia.

CHARLES E. FORD PER H. C. ALDER
Attorney for Petitioners

25

Schedule of Properties Seized

1. Two adding machines.
2. One small suitcase containing certain memoranda and paper slips.
3. Currency and change in the amount of about Nine Hundred and Sixty Eight Dollars (\$968).

Filed Oct. 16 1946

Findings of Fact.

Defendant McDonald rented a room some time in October, 1945, from one Barbara Terry, who occupied premises known as 1608 Third Street, N. W. Previous to this the police had arrested McDonald at premises known as 522 Second Street, N. W. and found him in possession of a numbers headquarters. Receiving information that McDonald had moved his activities to his home at 2807 Thirteenth Street, N. W., the police placed the premises under observation and noted considerable activity which indicated to them that a numbers game was in operation. The police were getting ready to raid the Thirteenth Street premises when McDonald again moved, and they then learned he had located in the 1608 Third Street premises. The police had observed McDonald enter these premises early in the afternoon on several occasions and leave between 5:30 and 6:30 p. m., the hours during which operations of the headquarters of numbers games are customarily carried on. On no occasion while the police had the premises under observation did McDonald ever remain overnight. Three police

officers surrounded the Third Street premises on 27 June 22, 1946, the date of the offense charged in the indictment. One of the officers heard a noise that sounded like a typewriter or adding machine in operation. Adding machines are customarily used in connection with the crime of conducting a lottery through use of numbers slips. Officer Ogle raised a side window facing on the front porch of the premises and went in. He opened the front door for Officer Blick and opened the rear door to admit Officer Clark. These officers had neither a warrant of arrest nor a search warrant.

All the rooms in the premises were open except the one occupied by Defendant McDonald. These rooms were searched by the officers. McDonald rented the rear room on the second floor and this door was locked. Officer Ogle

placed a chair in front of this door, stood on it and looked through the glass transom above the door. He observed numbers slips and money piled on the table and there were adding machines on the table. Defendants McDonald and Washington were in the room. Officer Ogle called to McDonald that he might as well open the door and McDonald unlocked and opened the door.

Conclusions of Law.

Defendants may not avail themselves of a wrongful entry of the premises of Barbara Terry and a search of rooms, except insofar as the premises were occupied by or were in lawful possession of defendants. See *Gibson v. United States*, — App. D. C. —, 149 F. 2d 381, 384; *Shore v. United States*, 60 App. D. C. 137, 49 F. 2d 519.

When Officer Ogle looked through the glass transom into defendant McDonald's room he saw a crime actually in course of being committed. Both McDonald and Washington were in actual possession of numbers slips and of adding machines which customarily are used in promoting a lottery. The officers had the right to arrest defendants and in doing so require them to open the door of the room, enter the room and seize whatever articles appeared to be used in carrying on the crime.

The motion to suppress will be denied.

BOLITHIA J. LAWS

Chief Justice

October 16, 1946

29

Wednesday, November 13, 1946

The Court resumes its session pursuant to adjournment:
Hon. Henry A. Schweinhaut, Presiding:

Criminal No. 77468

UNITED STATES

v.

EARL H. McDONALD, JOSEPH F. WASHINGTON

Come as well the Attorney of the United States, as each defendant in proper person, each according to his recognizance, and each by his attorney, Charles E. Ford, Esquire; whereupon, upon stipulation of the Attorney of the United States, and each defendant by his counsel; and thereupon each defendant waives his right to trial by jury, and each defendant submits himself to trial by the Court; and thereupon the said trial is begun; whereupon after arguments by counsel the case is submitted.

31

Monday, January 20, 1947.

The Court resumes its session pursuant to adjournment:
Hon. Henry A. Schweinhaut, Presiding.

Criminal No. 77468

UNITED STATES

v.

EARL H. McDONALD, JOSEPH F. WASHINGTON

Come as well the Attorney of the United States, as each defendant in proper person, according to his recognizance, and the defendant Earl H. McDonald by his attorney, Charles E. Ford Esquire, and the defendant Joseph F. Washington by his attorney, Clifford Alder, Esquire; and thereupon each defendant's motion for the return of seized

property and suppression of evidence heretofore argued and submitted in this case is by the Court denied; whereupon each defendant is found guilty as indicted and the case is referred to the Probation Officer of the Court; and thereupon each defendant is permitted to remain on bond pending sentence.

32

Friday, March 28, 1947

The Court resumes its session pursuant to adjournment:
Hon Henry A. Schweinhaut, Presiding:

Criminal 77468

UNITED STATES

v.

EARL H. McDONALD

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorney, Charles E. Ford, Esquire; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) months to Eighteen (18) months.

Criminal No. 77468

UNITED STATES

v.

JOSEPH F. WASHINGTON

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance,

and by his attorney, Charles E. Ford, Esquire; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Sixty (60) days.

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

Barbara Terry was called as a witness for and in behalf of the defendants,

Direct Examination

By Mr. Ford: —

Q. Give us your full name. A. Barbara Terry.

Q. Where do you live? A. 1608 3rd Street, Northwest.

Q. In the District of Columbia? A. Yes.

Q. How long have you lived there? A. Eight years.

Q. And directing your attention particularly to June 22nd, of '46, of this year, were you still living there? A. Yes, sir, I was.

Q. And do you live in those premises today? A. I do.

Q. Now, I am directing your attention to the 22nd of June, and while you were in your premises did something unusual occur? A. Yes, it did.

Q. As you started to walk in the hallway, that is, the hallway on the first floor, what occurred? A. Well, as I came from the kitchen, I went to my bedroom, and

I opened my door, and there is a door that closes from the hall, and I found this man in my room, which I later learned was an officer.

* * * * *

45 Q. Directing your attention to that man, is that the man that was in your bedroom? A. Yes, sir.

* * * * *

[After Detective Sergeant Ogle and Lieutenant Blick had been identified, the examination continued.]

46 Q. When Detective Sergeant Ogle opened the storm door, did that man enter? A. He did.

Q. Then that made three of you, you, Detective Sergeant Ogle and this other officer? A. Yes.

Q. What happened next? A. Mr. Ogle went back through the hall to the kitchen door, unlocked the kitchen door and unhooked the screen door, and called for another gentleman to come in.

* * * * *

47 Q. After he let him in the rear door in the kitchen, then what happened? A. Well, he searched in the pantry on his way from the kitchen, and in the middle room.

Q. That is the middle room on the first floor? A. Yes. He continued up the steps, in fact, all did, and so naturally I went behind them.

Q. Now, we come to the steps, and you said they went up? A. Yes.

Q. Will you describe for me, please, going upstairs? Is that steps that lead to the second floor? A. It is.

Q. Did the officers to go up those steps after they looked in the other rooms? A. They did.

Q. What happened when they got to the second floor? A. Well, they went up. Mr. Ogle went up to the bedroom doors and he searched in the closets.

Q. Which room? A. In the front room on the second floor.

48 Q. That would be the room over your bedroom; correct? A. Yes.

Q. Now, did Ogle go into that room and make a search? A. Yes.

Q. What else did he do? A. There is a closet in the hall, and a clothing closet, and he opened that and looked through that.

He went in the middle bedroom on the second floor, searched through that, and opened the closet, and the next is the back room, and when he gets to the back room, the door, it was locked.

Q. Now, the back room on the second floor, would that be the room directly over the kitchen? A. Yes; partly over the kitchen.

Q. Now, you said—were all the other doors except the door on the back room open? A. Yes.

Q. Now, when he came to the room on the rear that had the door closed—it was locked, wasn't it? A. It evidently was because he went back to the middle bedroom and got a chair and looked over the transom.

Q. When he got the chair, did he bring it out of the middle room and put it against the door to see? A. That is right.

Q. Now, the door that was locked in the back, was there a transom over that door? A. Yes.

Q. If you get a chair or something, a stepladder, or something, can you look through the transom if you stand on it and see in the back room? A. Yes.

Q. When he got, Ogle got the chair and looked in, what was said or what transpired? A. He said to open the door.

Q. Now, did he say that or direct that to somebody inside the locked room? A. Yes.

Q. Who occupied that back room with the locked door? A. Mr. McDonald.

Q. And does he rent that room from you? A. Yes, sir, he did.

Q. And when was it he came there and rented that room from you? A. I can't recall the exact date, but it was October of 1945.

Q. Would you say it would be a fair statement that he has been renting that eight or nine months? A. He had been a roomer there; yes.

Q. Now, when Ogle yelled to open the door, what happened? A. They opened the door.

50 Q. And then was that door opened from the inside; correct? A. Yes.

Q. How was it opened, the door, after Ogle said: Open that door? A. I could not see how he opened the door.

Q. When the door was opened, who did you see? A. I saw Mr. McDonald and Mr. Washington.

Q. Those are the two men that sit here? A. Yes, but I didn't know they were in the house.

Q. Then what did the officers do? A. They proceeded to talk to them and told them what they were doing.

Q. Was that to these two men? A. That is right.

Q. And then the officers carried out some, what is known as gambling equipment; is that right? A. That is right.

Q. And they took some pictures inside the room, did they not? A. They didn't allow us to go in the room.

Q. Coming back to the time when you saw Ogle standing in the middle of your bedroom, or in your bedroom, do you know how he got in there? A. There was only one
51 way to get in. There is a porch window.

Q. How was that? A. The window was, the porch window was partly opened, and how he got it opened, I don't know. That would be the only way because in the basement, the window down there wasn't open.

Q. Did you at any time invite these officers into these premises? A. No, sir, I didn't.

Q. Did you at any time admit them into the premises? A. No, sir, I didn't.

Q. Did they at any time ask you if they could come in your premises? A. No, they didn't because had they asked me, I would have admitted them.

Q. And they didn't ask you? A. They didn't ring the bell or knock at the door.

Q. Are any of these other rooms in that house rented to any other people? A. Yes.

52 Cross Examination

By Mr. Burke:

Q. When was the first time you knew what he was doing there? A. When he told me, when he went upstairs and said that he was looking for someone. I didn't know then and he didn't call any name of who he was looking for.

Q. When was the first time you knew who he was, Ogle?

A. When he went to open the front door. He said:
53 I am a police officer and showed his badge, but that was all he said to me, and then he brushed me aside.

54 Q. Now, you say you didn't know he was running a lottery there? A. I didn't.

Q. And you would not have tolerated it if you had known it? A. Of course not.

Q. And you would be most anxious to cooperate with the police stopping any such goings on? A. Anxious to cooperate with the police?

Q. In stopping that sort of thing. A. What do you mean?

Q. Running a lottery, a numbers game in your house?

A. I would not rent my room to anyone to do that.

Q. You would not want that to continue after it was known to you? A. I certainly would not.

55 Q. And you would be glad to help the police stop that sort of thing? A. By the mere fact that I would not rent my room for that.

Q. But if the police came in looking for such a thing, you would want to cooperate? A. If they came to my door and knocked at my door, or rang my bell, I would admit them.

My objection is the manner in which they came in the house.

Q. You don't object to the fact that they came in your house after a law violator? A. I object to the manner.

Q. You said if you had known what they were after, you would be glad to let them in? A. If they knocked on the door, I would have admitted them.

Q. So that now that you know what they were doing, do you object to their going in there to look for a man violating the law?

Mr. Ford: I object to what she knows now.

The Court: I think she can answer the question.

56 By Mr. Burke:

Q. Do you object to the officers doing that? A. I object to the manner they came in.

Q. What did you tell them? A. I object to the way they came in.

Q. When did you tell them that? A. I told them there.

Q. After you knew they were officers? A. Yes, after I knew they were officers.

Q. Mr. Washington didn't have any right to come in your house? A. I didn't know he was in there.

Q. He didn't rent from you? A. No.

Q. Mr. McDonald didn't have any right to use your bedroom, did he? A. My bedroom?

Q. Yes. A. He never used it.

Q. Well, the rent he paid didn't entitle him to go in your bedroom? A. He wasn't in my bedroom.

Q. He wasn't entitled to go in there as a roomer? A. No one is entitled to go in there.

Q. Now, when the officer looked over the transom, 57 you say he stood on a chair? A. Yes, he did.

Q. And he didn't open the door himself but asked the occupant to open the door; is that right? A. That is right.

Q. And you don't know what was taken out of this room, do you? A. No, because they put me in the front room and told me to stay there.

Q. Were you on the second floor when they looked through the transom? A. Yes, I was.

Q. When were you asked to go to the front room? A. When they went into the room.

Q. So you could not see whether anything was taken out of the room? A. I saw it when they brought it out.

Q. What did they bring out? A. Some papers and some machines.

60 **Officer Howard E. Ogle** was called as a witness for and in behalf of the defendants,

61 Q. Now, I will ask you on that day in those premises, were you in a front room of that house? A. Yes, sir.

Q. By yourself, were you, when you were first in that room? A. No, sir.

Q. Who was with you in that room when you were first in that room? A. Barbara Terry.

Q. Anyone else? A. At the first moment, no; later on.

Q. That is the time I am talking about. A. Yes.

Q. How did you get in the room at that time? A. I went through a side window going off the porch.

Q. Now, speaking of the side window, this side window of that room on the porch is designated as what? Is this front porch of this house a metal porch, that you go into the front door? A. Yes.

62 Q. And this window you speak of would be in the bay window, closest to the porch? A. Yes.

Q. It would be on your left? A. Yes.

Q. Did you go through that window? A. Yes.

Q. How? A. The window was unlocked and I raised it and went through.

Q. The window was unlocked and you raised the window, did you? A. That is right.

Q. And you climbed into it? A. Yes.

Q. Into that room? A. Yes.

Q. Is that right? A. Yes.

Q. Then, after you got in the room there came a time when you went out of the room to the front door of the house and let someone else in from the front? A. Yes; later on.

Q. And that was Detective Sergeant Blick? A. Lieutenant Blick.

Q. And then he joined you in the house? A. Yes.

63 Q. Now, at that time did you have any search warrant of any kind for those premises? A. I did not.

Q. At that time did you have a warrant of arrest, or any kind of warrant, for Earl McDonald, who sits here? A. I did not.

Q. At that time did you have any kind of warrant for Joseph Washington, who sits here? A. I did not.

Q. Did you at that time have any kind of warrant for a Mrs. Terry? A. I did not.

64 **Earl H. McDonald** was called as a witness in behalf of the defendants.

Q. Now, I will ask you to direct your attention to June 22nd, of this year, and premises 1608 3rd Street, Northwest, and ask you whether or not on that day you were in those premises? A. Yes, sir, I was.

Q. Did you live and work in these premises? A. Yes, sir.

Q. What part of the premises did you occupy? A. The rear room on the second floor?

Q. Who did you rent from? A. Mrs. Terry.

Q. And that is the lady who testified here a minute ago? A. Yes.

Q. Did there come a time when you—by the way, you said you lived and worked there? What kind of work
65 did you do there on that day? A. I had a numbers business.

Q. And you were gambling in that room; is that correct?

A. Yes.

Q. On that day did Detective Sergeant Ogle and other officers take some equipment and papers out of that room?

A. Yes, sir.

Q. And who owned those papers and that equipment?

A. I did.

Q. Did you at that time on that day give these officers permission to come in that room? A. No, sir.

Cross Examination

By Mr. Burke:

Q. What was the equipment that they removed from that room? A. Some tickets, and I think it was two adding machines. One of them was broken.

Q. Numbers tickets? A. Yes, sir.

Q. And the adding machines were used to make up your totals? A. They were at times used for that purpose.

66 Q. Were you using them that day? A. Not at that time, sir.

Q. What was the gentleman, Washington, doing in there with you? A. I just had him in there along with me.

Q. Just a friend? A. He is a friend; yes, sir.

Q. And he is not—he didn't occupy the room with you? A. No, sir.

Q. Was that room your home? A. Yes, sir, more or less. I stayed there occasionally.

Q. I beg your pardon. A. I stayed there occasionally.

Q. Where did you stay when you didn't stay there? A. At 13th Street, Northeast.

Q. That is your home at 2807 13th Street, Northeast, is it not? A. That is correct.

Q. Now, when you rented the room, did you tell the landlady what purpose you wanted it for? A. I told her I was having trouble at home and wanted a place to stay.

Q. Did you tell her you were working on the railroad?

A. I don't remember.

Q. How did these gentlemen, these officers, get
67 into your room? A. One of the officers, the gentleman known as Mr. Ogle, had a chair or something outside the room, and he pushed open the transom, and when he looked in there, he said: All right, Earl; we are in the house now. You might just as well open the door. So I opened the door.

Q. And you let him in? A. Yes.

Mr. Ford: He opened the door in response to some command. There is quite a difference.

The Court: It is a proper question.

By Mr. Burke:

Q. He was followed by Blick and Clark? A. Yes.

Mr. Burke: That is all.

Mr. Ford: That is all; step down.

(Thereupon the witness was excused and retired from the witness stand.)

Mr. Ford: That is our case, may it please your Honor.

Mr. Burke: I move to dismiss the motion as to the defendant Washington. As to him nothing has been shown whatsoever of any property taken and no right of possession.

70 **Officer Howard E. Ogle** was called as a witness for and in behalf of the United States.

71 Direct Examination

By Mr. Burke:

Q. Officer, when you went to this place and arrested Mr. McDonald, at that time, what knowledge had you of his having engaged at any time in the numbers business?

Mr. Ford: May we have the date of this knowledge?

By Mr. Burke:

Q. Did you have any such knowledge? A. Yes, sir.

Q. What was that knowledge? How did you acquire it?

A. I have known Earl McDonald for a number of years. Less than a year ago I had occasion to arrest him in his supposed residence at that time at 522 2nd Street, Northwest, and his home—he lived at twenty—I think it is 2807.

Mr. Ford: I object to that as being a conclusion.

The Court: He has already said that.

The Witness: I know his home and he lives in, I think it is 2807 13th Street, Northwest. I seen him go in that house, I guess, fifty times.

By Mr. Burke:

Q. What did you find when you arrested him last
72 year on 2nd Street? A. A numbers headquarters, adding machines, numbers, telephones.

Q. What did you know about his use of this address on 3rd Street, 1608? A. I had received information that he had moved his activities from 522 2nd Street, Northwest, to his home, and we watched his home, and we saw quite a bit of activity, and we were getting ready to raid him when he suddenly left there, and he moved, and we got information he went to 1608 3rd Street, on the second floor, back room, and there I had watched him myself go in the house, the usual hours, between 1:30 and 2 o'clock.

Q. Afternoon or morning? A. Afternoon.

Q. Yes, go ahead. A. And he drove up in his car, 103,565. He has a Cadillac, a green Cadillac, and that became very hot. We knew him everywhere we saw him. So he got himself another car, 103,565, and I have seen him in that car, and on numerous occasions this car would be parked in the 1600 block of 3rd Street, and he would be in there from 1:30 until 5:30, and he would go out and get in the car and go away.

Q. Do those hours mean anything in the operation of the numbers game? A. That is the only time they op-

73 erate, as far as headquarters operations is concerned.

Q. What do you mean, headquarters operations?

A. Where they gather all the numbers and take them into the place, run them up on the adding machines, and give out the first, second, and third number over the telephone.

Q. And they do that between what hours? A. The races start about 2 o'clock in the afternoon and last until five, and I had occasion at this house, 1608 3rd Street, while we were there the phone rang, I would say, one hundred times. I answered on more than one occasion.

Q. After you went in? A. No.

Mr. Ford: I object to this.

The Court: Yes.

By Mr. Burke:

Q. Before you went in, you observed he left at 5 o'clock?

A. Well, about—

Mr. Ford (interposing): He said the races run from 2 to 5:30.

The Court: I will permit the question.

The Witness: I have seen him come out.

By Mr. Burke:

Q. What time did he usually leave? A. Between 5:30 and 6:30.

74 Q. Did you observe him stay at the house all night or at any later hour? A. No, I have never seen that car at night out in front of the house. I have seen the Cadillac in front of his own home.

Mr. Ford: That is not responsive. He is talking about an automobile now.

Mr. Burke: All right.

By Mr. Burke:

Q. Did you at any time hear anything from this address, 1608 3rd Street, Northwest, while you were observing there?

A. I did not but Detective Sergeant Clark did.

Mr. Ford: I object to what Clark said.

The Witness: I did not.

The Court: Mr. Ford, do not worry about the testimony. I will hear it.

Mr. Ford: I realize your Honor will separate it.

By Mr. Burke:

Q. Had you any other knowledge about his record of engaging in the numbers game, besides the fact you had arrested him once and that you received information during the past year? A. I know he is classed as a numbers operator on a very large scale.

Q. Now, after you got in the house, after you went upstairs, what did you do just before you entered the
75 room? A. He had his room on the second floor, the rear room, and the room was locked and I would not break the door open, and I stood on a chair and looked over the transom, and I saw Earl and Washington in the room, saw the adding machines and the numbers piled on the table, and I saw all the money piled on the table, and he was standing in a corner, and I said: Earl, open the door, and he opened the door and I walked in the room.

Q. Did you speak through the transom or through the door? A. I was standing on a chair at the time that I said: Earl, open the door, and Earl, he came around, and I stayed on the chair and he opened the door, and I got off the chair and he opened the door, and I got off the chair and walked in.

Q. Was the transom open or shut? A. As I recall, it was closed. It was closed.

Q. Did you open it? A. No, sir.

Mr. Burke: That is all.

Cross Examination

By Mr. Ford:

78 Q. Now, with all of this information that you told us you had about how many times would you say you

have applied to a United States Commissioner or a Judge to get a warrant either of arrest or a search warrant? How many times would you say you have obtained and executed them? A. I have talked it over on a few occasions with Mr. Turnage.

Q. I am asking you about McDonald. How many times have you applied to anyone—you know where the Commissioner is? A. Yes.

79 Q. And he issues search warrants? A. Yes.

Q. And you have known that for years and you have been through that procedure? Now, let me ask you this: With this information that you have told His Honor that you had about Earl McDonald, did you take that information to a United States Commissioner or any Judge in the District of Columbia and obtain either a warrant of arrest or a search wararnt for Earl McDonald? A. I have applied on a few occasions but I never obtained a warrant.

Q. And that was the same situation this time as when you said you arrested him before, a year ago, and you didn't have a warrant then of any kind, did you? A. No, sir. He didn't live there either.

Officer Paul H. Clark was called as a witness for and in behalf of the United States.

80 Direct Examination

By Mr. Burke:

Q. State your full name. A. Paul H. Clark, Sergeant, Metropolitan Police, Detective Bureau.

Q. You participated in the arrest of Earl McDonald and Joseph Washington on June 22, 1946, at 1608 3rd Street, Northwest? A. I did, sir.

Q. On that day theretofore, did you have that place of this defendant under observation? A. We did, sir.

Q. For how long? A. For a period of two months, to my knowledge.

Q. Did you at any time hear any noises coming from that house of any particular description? A. Just prior to the entrance to the house on that day, Lieutenant Blick and Sergeant Ogle went to the front, and I went to the rear on the alley, and there was a fence in the alley and a yard perhaps 20 or 25 feet long, and I could hear a noise, it sounded like it was a typewriter or an adding machine, I could not say which it was, but it sounded to me as it could be a typewriter or an adding machine.

I stayed there until Sergeant Ogle came to the back door of the house with this Mrs. Terry, and we entered the house.

81 Q. Will you tell us whether that machine was electric or manual? A. It sounded to me as if it was an electric machine.

Mr. Ford: He said he didn't know which it was.

The Court: That is argumentative.

By Mr. Burke:

Q. Do you know how adding machine may be used in the operation of numbers games? A. It is used to run what they call the run down tape for the total number slips for each individual operator. They add up the totals on the pads and that is run on the tape, and generally speaking, they have two tapes in the adding machine, a duplicate tape. A One is held by the person that tallies down, and the other tape is sent back to the person who supplies the numbers pads, and which shows their play for that day and the amount of their play for that day.

Q. Have you, to your knowledge, ever known the defendant to have used adding machines before in the operation of the numbers game? A. Yes, sir.

Q. This defendant, McDonald? A. Yes.

Q. Did you hear any other noises, such as clicking or humming or whirring from that house that day? A. The

82 only noise I heard was the noise of this machine running, and it sounded as if it might have been an adding machine:

Mr. Burke: You may inquire.

Cross Examination

By Mr. Ford:

Q. Do you break into every place where you hear a machine and where you don't know whether it is an adding machine or a typewriter? A. What do you mean?

Q. Do you break in every place from which you hear a sound and which you do not know whether it is the sound of an adding machine or a typewriter? A. Whenever I have enough, sufficient evidence to give me probable cause to enter any premises in the District that is committing a felony, we will enter the premises.

Q. Whenever you have enough evidence to make you believe that is probable cause? Why didn't you go to the duly constituted authority and get a warrant, a warrant of arrest or search warrant? A. Sometimes that is not the best thing to do.

Q. That is right. A. For one reason, that is the fact that when once you visit these premises, and if we leave the premises and go to the United States Commissioner's Office, when we return to the premises, I will say in 99
83 per cent of the cases, there will be nothing there.

Q. You don't mean that some of the police officers will tell them that you have been there and they get away? A. No, sir.

Q. I understood you to say that is not the best thing to do. When you determine it is not the best thing to do, in those cases you determine it because the duly constituted authority won't issue a search warrant? A. I didn't say that.

Q. In this case the United States Commissioner refused to issue any warrant after you had gone there and discussed

it with him; isn't that so? A. I believe, probably, we discussed it with him, this last case.

Q. You know Detective Sergeant Ogle? A. Yes.

Q. Didn't he on three occasions discuss it with the United States Commissioner? A. To the best of my recollection, on several occasions we have discussed a similar set of facts.

Q. I want to know whether or not you know Sergeant Ogle went in this case three times to the United States Commissioner and could not get a warrant? A. No, sir.

Q. Of course, you are with Detective Sergeant
84 Ogle every day and practically every night? A. That is right.

Mr. Ford: I have no further questions.

Mr. Burke: That is all.

• • • • •

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9524

EARL H. McDONALD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 9525

JOSEPH F. WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the District Court of the United States for the
District of Columbia

Argued October 8, 1947

Decided February 16, 1948

Mr. Charles E. Ford, with whom *Mr. John Lewis Smith, Jr.*, was on the brief, for appellants.

Mr. John P. Burke, Assistant United States Attorney, with whom *Mr. George Morris Fay*, United States Attorney, was on the brief, for appellee. *Messrs. Sidney S. Sachs* and *John D. Lane*, Assistant United States Attorneys, also entered appearances for appellee.

Before EDGERTON, CLARK and WILBUR K. MILLER, JJ.

WILBUR K. MILLER, J.: Appellants were tried on four counts for promoting a lottery, possessing lottery tickets, and keeping a "place" and a "table" for betting on horse races. D. C. CODE (1940) §§ 22-1501, 1502, 1504. Their motion before trial for the return of the seized property and suppression of evidence was denied. Having been found guilty on all counts, they appeal, contending the property should have been returned and the evidence suppressed because obtained in violation of their constitutional right to freedom from unreasonable search and seizure.

The police believed that appellant McDonald operated a numbers headquarters. They kept his home under observation for some time and saw "quite a bit of activity" there. He had previously been arrested for numbers operations. On being told that he had moved

to the residence of a Mrs. Terry, where he occupied a back room on the second floor, the police set a watch on the house. Several times they saw him enter this house in the early afternoon, when numbers operators customarily go to their headquarters, and leave in the late afternoon, when they customarily leave.

On the afternoon of June 22, 1946, police officers Ogle, Blick and Clark watched the Terry house. One of them heard a noise that sounded like an electric typewriter or an adding machine; he "could not say which it was." It was proved at the trial that there was an electric sewing machine in the house, which made a similar sound, and that adding machines are often used in numbers operations. The outer doors of the house were locked. Officer Ogle opened a window and entered Mrs. Terry's apartment on the first floor. She found him there and screamed. He brushed her aside, told her he was an officer, and unlocked the outer doors of the house to admit Blick and Clark. The three officers searched the rooms on the first floor, which were not locked. They then searched rooms on the second floor, starting at the front and working back. When they came upon a locked door at the back of the hall, Ogle mounted a chair and looked over the transom into what proved to be the room rented by appellant McDonald. There he saw both appellants, and also adding machines, numbers slips, and money. He called to McDonald to open the door. McDonald did so and the police entered his room, arrested him and Washington, and seized property which is described in the motion for return as adding machines, a suitcase containing papers, and \$968. in money. The officers had no search warrant for the house or for McDonald's room, and no warrant of arrest for anyone.

In order to complain of an unlawful search and seizure, one must have an interest in the place searched or the property seized.¹ The appellants cannot complain that an unlawful entry was made into Mrs. Terry's first floor apartment in which they had no interest, nor were they concerned with the search of the rooms of the upper floor occupied by others, nor could Washington protest against an unlawful search of McDonald's room, had there been one. It does not appear that any search was made of the hall on the second floor, which after all was used in common by all the tenants and their guests. The closest approach to a search of McDonald's room was the act of the officer in looking through the transom at McDonald and Washington engaged in an unlawful activity. Having observed the commission of a misdemeanor in his presence, the policeman and his fellow officers were justified in knocking at the door, demanding entrance, and arresting the defendants.

The only problem in the case is whether looking through the transom amounted to an unlawful search. It was not gentlemanly to spy on McDonald in that manner, but his constitutional rights were not thereby invaded. In *United States v. Lee*, 274 U. S. 559, 563, the Supreme Court held that the use of a search light by a Coast Guard patrol boat by means of which contraband liquor on a motor boat was observed, did not amount to a search. That case was cited in *Safarik v. United States*, 62 F. (2d) 892, 895 (C. C. A. 8th 1933), in which a flash light was used. *Smith v. United States*, 2 F. (2d) 715 (C. C. A.

¹ *Gibson v. United States*, 80 U. S. App. D. C. 81, 149 F. (2d) 381, cert. denied sub. nom. *O'Kelley v. United States*, 326 U. S. 724.

4th 1924), is another flash light case to the same effect. See also *People v. Marvin*, 358 Ill. 426, 193 N. E. 202; *Koscielski v. State*, 199 Ind. 546, 158 N. E. 902; *Crowell v. State*, 147 Tex. Cr. R. 299, 180 S. W. (2d) 343.

Many cases from both state and federal courts hold the word "search" connotes uncovering that which is hidden, prying into hidden places for that which is concealed. It is not a search to observe what is open to view. In *Olmstead, et al. v. United States*, 277 U. S. 438, 465, the wire tapping decision, the court remarked that the liberal construction given to the Fourth and Fifth Amendments "cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers and effects, or so to apply the words search and seizure as to forbid hearing or sight." (Italics supplied.)

For the reasons given, both judgments are

Affirmed

EDGERTON, J., *dissenting*: By guaranteeing freedom from "unreasonable searches and seizures," the Fourth Amendment "forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent . . ."

1. The search of the house was unreasonable and therefore illegal. The house was a dwelling. Search of a dwelling without a warrant is never reasonable except when incidental to a lawful arrest.² Search of this house was not incidental to any arrest either lawful or unlawful. The officers had no right³ to, and did not, break into the house in order to arrest McDonald. It does not even appear that they knew he was present. They broke and entered the house in order to make the illegal search they made. Instead of being incidental to the arrests the search led to the arrests.

The officers searched McDonald's room before they entered it. Though it is "not a search to observe what is open to view," it is a search to open things to view and then observe them. The room and its contents were opened to view by forcible invasion of the house and corridor, and then observed from the corridor. This search of McDonald's room was illegal, like the previous search of the other rooms and for the same reasons. If this had been otherwise what the officers saw might perhaps have justified them in entering the room, making the arrests, and seizing the property. But that is quite immaterial. Since the search was illegal it justified nothing. The arrests and seizures were as illegal as the search itself. "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light,"⁴ and evidence obtained by unlawful search is not made admissible by arresting its owner.⁵ The government

¹ *Go Bart Importing Co. v. United States*, 282 U. S. 244, 357.

² *Agnello v. United States*, 269 U. S. 20, 32-33.

³ *Johnson v. United States*, U. S. , decided Feb. 2, 1948.

⁴ *Byars v. United States*, 273 U. S. 28, 29.

⁵ *Go Bart Importing Co. v. United States*, *supra* note 1; *Taylor v. United States*, 286 U. S. 1.

cannot "justify the arrest by the search and at the same time . . . justify the search by the arrest."⁶

It is true that in order to complain of an unlawful search and seizure one must have an interest in the place searched or the property seized. Appellant Washington had neither, for he was only a guest of appellant McDonald. But McDonald had both. He rented the room searched and he owned the property seized. He was of course entitled to use the corridor. In my opinion illegal search of the room by illegal invasion of the corridor was a plain violation of his constitutional right.⁷

The question is not whether officers may look in an unconventional way into another place, from a place in which they have a right to be and in which the person who complains has no interest.⁸ The question is whether officers may look into a room from a place in which they have no right to be and in which the person who complains does have an interest; the corridor that is the only means of access to his room. A roomer's constitutional right of privacy is a fiction that keeps the word of promise to the ear and breaks it to the hope unless it includes a right not to be spied upon by trespassers who force their way into his corridor. Yet the government contends that search by such trespassers is reasonable and the court decides that it is not a search. Neither of these propositions is comprehensible to me. No doubt a roomer's interest in a corridor is different from a householder's. Probably the one may be called an easement and the other an estate, as the government suggests. But I know of no reason why this difference should be critical here. To hold that McDonald cannot complain because he is only a roomer perverts the letter as well as the spirit of the constitutional guaranty against unreasonable searches and creates a discrimination in civil rights that is out of place in a democratic society.

⁶ *Johnson v. United States*, *supra* note 3.

⁷ Cf. *Brown v. United States*, 83 F. 2d 383 (C. C. A. 3d); *Warman v. United States*, 12 F. 2d 775 (C. C. A. 9th), *cert. denied*, 273 U. S. 716; *Cohn v. United States*, 36 F. 2d 164 (C. C. A. 10th).

⁸ That was the question in the *Lee* case on which the court relies.

[fol. 32] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Feb. 16, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, JANUARY TERM, 1948

No. 9524

EARL H. McDONALD, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

No. 9525

JOSEPH F. WASHINGTON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

Appeals from the District Court of the United States for the District of Columbia

Before Edgerton, Clark and Wilbur K. Miller, JJ.

Judgment

These appeals came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and were argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in these causes be, and the same are hereby, affirmed.

Per Mr. Justice Wilbur K. Miller.

Dated February 16, 1948.

Dissenting opinion by Mr. Justice Edgerton.

[fol. 33] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Mar. 2, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9524

EARL H. McDONALD, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

No. 9525

JOSEPH F. WASHINGTON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs.
2. Opinion.
3. Judgment.
4. This designation.
5. Clerk's certificate.

Charles E. Ford, John Lewis Smith, Jr., Attorneys
for Appellants.

I hereby acknowledge service of a copy of the foregoing motion this 2nd day of March, 1948. John P. Burke, Assistant U. S. Attorney, Attorney for Appellee. C.M.

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 33, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellants in the cases of:

No. 9524

EARL H. McDONALD, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

and

No. 9525

JOSEPH F. WASHINGTON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

No. —, January Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fourth day of March, A. D. 1948.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 19, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. **36**

EARL H. McDONALD, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

No.

JOSEPH F. WASHINGTON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA.**

CHARLES E. FORD,
Columbian Building,
Washington 1, D. C.

JOHN LEWIS SMITH, JR.,
729 15th St., N. W.,
Washington 5, D. C.
Attorneys for Petitioners.

INDEX.

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement of the case	2
Specification of errors to be urged	4
Reasons for granting the writ	4
Conclusion	7

CITATIONS.

CASES:

Brown v. United States, 83 F. (2d) 383	5
Coon v. United States, 36 F. (2d) 164	6
Johnson v. United States, 92 L. Ed. 323	4
Waxman v. United States, 12 F. (2d) 775	6

STATUTES:

Constitution, 4th and 5th Amendments	2
--	---

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

No.

EARL H. McDONALD, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

No.

JOSEPH F. WASHINGTON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA.**

Petitioners, Earl H. McDonald and Joseph F. Washington, respectfully pray for writs of certiorari to review the decision and judgments of the United States Court of Appeals for the District of Columbia, entered on February 16, 1948, affirming the judgments of the District Court of the United States for the District of Columbia.

The Opinions Below.

The District Court filed no opinion when it denied the motion to suppress, adjudged the petitioners guilty, and imposed sentence. The earlier memorandum opinion of the District Court on the motion to suppress (R. 6-7) is unreported. The majority and minority opinions of the Court of Appeals (R. 28-31) have not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 16, 1948. (R. 32) The jurisdiction of this Court is invoked under Rule 37b(2) of the Rules of Criminal Procedure.

Questions Presented.

Whether the action of police officers, after having applied to the United States Commissioner for a warrant and having been refused, in breaking into a private dwelling by climbing through a window without permission, proceeding on a general exploratory search of the premises without a warrant of any kind, and climbing on a chair in the second floor corridor to peer over a transom into a tenant's locked room constitutes an unreasonable search and seizure. Whether a roomer as well as a landlord has constitutional rights under these circumstances protected by the 4th and 5th Amendments.

Statement of the Case.

This case presents for correction errors of the District Court of the United States for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia.

About 3:30 P.M. on June 22, 1946, police officers Ogle, Blick and Clarke went to premises 1608 3rd St., N.W., Washington, D. C., a brick residence in a row of houses containing a basement, first floor and second floor. This residence was owned by Mrs. Barbara Terry, who occupied

part of the first floor and rented rooms. At the time of this occurrence Mrs. Terry had several tenants, one of whom was the petitioner McDonald who rented a room on the second floor. (R. 11; 13)

The police officers were not responding to an emergency call and did not have a warrant of any kind for anyone in the premises. They had neither a search warrant for the premises nor a warrant of arrest for either of the appellants. (R. 18) The police officers had applied to the United States Commissioner on several occasions but had never obtained a warrant. (R. 24)

The door to the residence is usually locked and was locked on June 22, 1946. Without the permission of Mrs. Terry, Detective Sgt. Ogle raised the window leading into her bedroom and climbed in through the window. (R. 17) Mrs. Terry screamed and Sgt. Ogle brushed her aside. He went to the front door, unlocked it and admitted Lt. Blick. Sgt. Ogle then went to the back door, unlocked the screen door and admitted Detective Sgt. Clarke. (R. 12)

The police officers then searched the rooms on the first floor and went up to the second floor. They searched the bedrooms and closets on the second floor. Noticing the rear room on the second floor was locked, Sgt. Ogle took a chair from the middle bedroom and looked over the transom. (R. 13) He then directed the occupant to open the door and petitioner McDonald complied with his instructions. Petitioners McDonald and Washington who were in the room were placed under arrest and certain property was seized by the officers. (R. 14) Mrs. Terry objected to the method in which the police officers entered her house without permission and without ringing the bell. (R. 15)

Petitioners were indicted September 6, 1946 on four counts involving one transaction for promoting a lottery, possessing lottery tickets and keeping a place and a table for wagering on horse races. (R. 34) A motion for the return of seized property and the suppression of evidence was filed on September 11, 1946 and denied by District Court on October 16, 1946. (R. 6-8)

On November 13, 1946, when the case came on for hearing, petitioners waived trial by jury and elected to be tried by the court. The motion for the return of seized property and the suppression of evidence was re-argued. On January 20, 1947 the District Court denied the motion and found the petitioners guilty on all four counts. (R. 10) On March 28, 1947 petitioner McDonald was sentenced to imprisonment for a period of six months to eighteen months and petitioner Washington was sentenced to imprisonment for a term of sixty days, after which an appeal was instituted. (R. 10-11)

Specification of Errors to be Urged.

The two justices of the Court of Appeals, forming the majority in the present case, erred in holding that the constitutional rights of petitioners were not violated by the actions of the police officers in this case and in affirming the judgments of the District Court.

Reasons for Granting the Writ.

1. The majority decision of the Court of Appeals has not given proper effect to and conflicts with the applicable decisions of this Court: It is considered unnecessary to cite the long list of leading cases on this subject.

Police officers in the instant case broke into a private dwelling without a search warrant and without a warrant of arrest for anyone. The record shows that the officers had applied to the United States Commissioner on several occasions but had failed to secure a warrant of any kind. (R. 24) In *Johnson v. United States*, 92 L. ed. 323, 325, decided February 2, 1948, this Court said:

"Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even

in the privacy of one's own quarters; is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

Having failed to obtain a warrant from the properly constituted authorities, the police officers in the present case took matters into their own hands and proceeded to make the search without such warrant. It is submitted that the majority opinion of the Court of Appeals is in conflict with the decisions of this Court and invites serious abuses of individual rights by the police.

2. The majority opinion of the Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal on the same matter. In treating a similar situation, the 3rd Circuit Court of Appeals said in *Broien, et al. v. United States*, 83 F. (2d) 383:

"The house was a private dwelling in which the proprietress with her family lived. She also kept roomers. It was not a hotel, restaurant, or public place where the public was invited or had the right to come and go at will. Into this home the officers of the government practically forced themselves without the semblance of authority, for they did not see any crime being committed and did not even have probable cause sufficient to justify the issuance of a search warrant, or probable cause to believe that Lillian Brown had committed a felony. The existence of probable cause does not justify the search of a private dwelling without a search warrant. *Gould v. United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; *Agnello v. U. S.*, 269 U. S. 20, 32, 33, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; *United States v. Lefkowitz*, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 A. L. R. 775. . . .

"Carinelli and Neubert were roomers in the house. It was their home and so far as the unlawful search affected them, it violated their constitutional rights.

"The entrance into the house was unlawful and the officers were trespassers. As such, they had no right to make an exploratory search of every room in the house from cellar to attic, ransacking every closet, dresser drawer, or piece of clothing, obtaining the key to some of the doors of the garage by threats and breaking down others. Any evidence obtained during and by means of such search may not be used against the defendants."

•Compare also *Waxman v. United States*, 12 F. (2d) 775 (C. C. A. 9th), cert. denied, 273 U. S. 716; *Coon v. United States*, 36 F. (2d) 164 (C. C. A. 10th).

The dissenting opinion of the Court of Appeals in the present case reads in part as follows (R. 31):

"A roomer's constitutional right of privacy is a fiction that keeps the word of promise to the ear and breaks it to the hope unless it includes a right not to be spied upon by trespassers who force their way into his corridor. Yet the government contends that search by such trespassers is reasonable and the court decides that it is not a search. Neither of these propositions is comprehensible to me. No doubt a roomer's interest in a corridor is different from a householder's. Probably the one may be called an easement and the other an estate, as the government suggests. But I know of no reason why this difference should be critical here. To hold that McDonald cannot complain because he is only a roomer perverts the letter as well as the spirit of the constitutional guaranty against unreasonable searches and creates a discrimination in civil rights that is out of place in a democratic society."

It is submitted that this minority opinion is in accord with the decisions of this Court and the various Circuit Courts of Appeal and that the ruling of the two Justices of the Court of Appeals, forming the majority, should be reviewed by this Court.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for writs of certiorari should be granted.

CHARLES E. FORD,
JOHN LEWIS SMITH, JR.,
Attorneys for Petitioners.



LIBRARY
SUPREME COURT, U. S.

NO. 36

Office - Sec'y. - Court, U. S.

SEP 20 1948

CHARLES ELMORE JEFFREY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

EARL H. McDONALD, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JOSEPH F. WASHINGTON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia.

BRIEF FOR THE PETITIONERS.

CHARLES E. FORD,
Columbian Building,
Washington 1, D. C.

JOHN LEWIS SMITH, JR.,
729 15th St., N.W.,
Washington 5, D. C.
Attorneys for Petitioners.



INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Specifications of Error	2
Constitutional and other Provisions Involved	2
Questions Presented	3
Statement of the Case	3
Argument	5
I. The search of the house was unreasonable and therefore illegal	5
II. Roomers in a private dwelling house are pro- tected by the constitutional prohibition against unreasonable searches and seizures	7
Conclusion	9
Appendix	10

TABLE OF CASES.

Aguello v. United States, 269 U. S. 20	5, 8
Boyd v. United States, 116 U. S. 616	5
Brown v. United States, 83 F. (2d) 383	7
Byars v. United States, 273 U. S. 28	6
Carroll v. United States, 267 U. S. 132	5
Coen v. United States, 36 F. (2d) 164	8
Go-Bart Importing Co. v. U. S., 282 U. S. 344	5, 6
Gould v. United States, 255 U. S. 298	8
Johnson v. United States, 92 L. Ed. 323	6, 7
Marron v. United States, 275 U. S. 192	5
Taylor v. United States, 286 U. S. 1	6
United States v. Lefkowitz, 285 U. S. 452	8
Waxman v. United States, 12 F. (2d) 775	8
Weeks v. United States, 232 U. S. 383	5, 6

STATUTES.

Title 22, Sections 1501, 1502 and 1504, District of Columbia Code (1940)	10
---	----

CONSTITUTION.

United States Constitution Fourth and Fifth Amendments	10
---	----

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

No. 36.

EARL H. McDONALD, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

No. 36.

JOSEPH F. WASHINGTON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia.

BRIEF FOR THE PETITIONERS.

THE OPINIONS BELOW.

The majority and minority opinions of the United States Court of Appeals for the District of Columbia (R. 28-31) are reported at 166 F. 2d 957.

JURISDICTION.

The judgment of the Court of Appeals was entered February 16, 1948 (R. 32). The petition for writs of certiorari was filed March 16, 1948, and on April 19, 1948, this Court granted the petition. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also, Rules 37(b) and 45(a), Federal Rules of Criminal Procedure.

SPECIFICATIONS OF ERROR.

The Court erred in denying petitioners' motions to suppress the evidence seized, petitioners having been subjected to unreasonable search and seizure in violation of the Fourth and Fifth Amendments to the Constitution because:

- (1) The police officers did not have a warrant of arrest for any one in the premises.
- (2) The police officers did not have a search warrant for the premises.
- (3) The police officers did not have probable cause to believe a felony was being committed, application for a warrant having been denied several times by the United States Commissioner.
- (4) The police officers forcibly entered the premises, without permission, and are guilty of a lawless violation of private property.
- (5) Roomers in a private dwelling house are protected by the constitutional prohibition against unreasonable searches and seizures.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED.

The constitutional and other provisions involved are set out in the Appendix, page 10, *infra*.

QUESTIONS PRESENTED.

Whether the action of police officers, after having applied several times to the United States Commissioner for a warrant and having been refused, in breaking into a private dwelling by climbing through a window without permission, proceeding on a general exploratory search of the premises without a warrant of any kind, and climbing on a chair in the second floor corridor to peer over a transom into a tenant's locked room constitutes an unreasonable search and seizure. Whether a roomer as well as a landlord has constitutional rights under these circumstances protected by the 4th and 5th Amendments.

STATEMENT OF THE CASE.

This case presents for correction errors of the District Court of the United States for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia.

About 3:30 P.M. on June 22, 1946, police officers Ogle, Blick and Clarke went to premises 1608 3rd St., N.W., Washington, D.C., a brick residence in a row of houses containing a basement, first floor and second floor. This residence was owned by Mrs. Barbara Terry, who occupied part of the first floor and rented rooms. At the time of this occurrence Mrs. Terry had several tenants, one of whom was the petitioner McDonald who rented a room on the second floor. (R. 11, 13)

The police officers were not responding to an emergency call and did not have a warrant of any kind for anyone in the premises. They had neither a search warrant for the premises nor a warrant of arrest for either of the appellants. (R. 18) The police officers had applied to the United States Commissioner on several occasions but had never obtained a warrant. (R. 24)

The door to the residence is usually locked and was locked on June 22, 1946. Without the permission of Mrs. Terry,

Detective Sergeant Ogle raised the window leading into her bedroom and climbed in through the window. (R. 17) Mrs. Terry screamed and Sergeant Ogle brushed her aside. He went to the front door, unlocked it and admitted Lieutenant Blick. Sergeant Ogle then went to the back door, unlocked the screen door and admitted Detective Sergeant Clarke. (R. 12)

The police officers then searched the rooms on the first floor and went up to the second floor. They searched the bedrooms and closets on the second floor. Noticing the rear room on the second floor was locked, Sergeant Ogle took a chair from the middle bedroom and looked over the transom. (R. 13) He then directed the occupant to open the door and petitioner McDonald complied with his instructions. Petitioners McDonald and Washington who were in the room were placed under arrest and certain property was seized by the officers. (R. 14) Mrs. Terry objected to the method in which the police officers entered her home without permission and without ringing the bell. (R. 15)

Petitioners were indicted September 6, 1946 on four counts involving one transaction for promoting a lottery, possessing lottery tickets and keeping a place and a table for wagering on horse races. (R. 3-4) A motion for the return of seized property and the suppression of evidence was filed on September 11, 1946 and denied by District Court on October 16, 1946. (R. 6-8)

On November 13, 1946, when the case came on for hearing, petitioners waived trial by jury and elected to be tried by the court. The motion for the return of seized property and the suppression of evidence was re-argued. On January 20, 1947 the District Court denied the motion and found the petitioners guilty on all four counts. (R. 10) On March 28, 1947 petitioner McDonald was sentenced to imprisonment for a period of six months to eighteen months and petitioner Washington was sentenced to imprisonment for a term of sixty days, after which an appeal was instituted. (R. 10-11)

ARGUMENT.

I.

The Search of the House Was Unreasonable and Therefore Illegal.

In *Carroll v. United States*, 267 U.S. 132, this Court said:

“ * * * Guaranty of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between the search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motorboat, wagon or automobile for contraband goods where it is not practicable to secure a warrant * * * because the vehicle can be quickly moved * * * ”

In the present case, the police officers did not have a warrant of arrest nor a search warrant. The house was a dwelling. It has been consistently held that search of a dwelling without a warrant is never reasonable except as an incident to a lawful arrest. (*Weeks v. United States*, 232 U.S. 383; *Agnello v. United States*, 269 U.S. 20; *Gobart Importing Co. v. United States*, 282 U.S. 344). Search of this house was not incidental to any arrest, either lawful or unlawful. The officers had no right to, and did not, break into the house in order to arrest McDonald. It does not even appear that they knew he was present. The officers broke and entered the house in order to make the illegal search, which instead of being incidental to the arrests led to the arrests.

Exploratory or general searches, not incidental to a lawful arrest, and not based on probable cause, violate the prohibition of the Fourth Amendment, and evidence seized as the result of such searches will be suppressed. (*Boyd v. United States*, 116 U.S. 616; *Weeks v. United States*, *supra*; *Marron v. United States*, 275 U.S. 192). Having forcibly invaded the house by opening and climbing through a win-

dow, the officers proceeded on a general exploratory search of the entire premises, finally standing on a chair in the second floor corridor and peering over the transom of a locked room. (R. 13) Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant and "a search prosecuted in violation of the Constitution is not made lawful by what it brings to light." (*Weeks v. United States*, *supra*; *Go-Bart Importing Co. v. United States*, *supra*; *Taylor v. United States*, 286 U.S. 1).

Necessarily the government must take its stand upon the proposition that the officers here possessed sufficient probable cause. The record shows that the officers had applied to the United States Commissioner on several occasions but had failed to secure a warrant of any kind. (R. 24) In *Johnson v. United States*, 92 L. Ed. 323, 325, decided February 2, 1948, this Court said:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably

1 *Baird v. United States*, 274 U. S. 28.

Yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

Having failed to obtain a warrant from the properly constituted authorities, the police officers in the present case took matters into their own hands and proceeded to make the search without such warrant. It is submitted that officers claiming access to private living quarters must have some valid basis in law for the intrusion. "Any other rule would undermine the right of the people to be secure in their persons, houses, papers and effects, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state, where they are the law."²

II.

Roomers in a Private Dwelling House Are Protected by the Constitutional Prohibition Against Unreasonable Searches and Seizures.

The majority opinion of the Court of Appeals for the District of Columbia is in conflict with the decisions of this Court and the various Circuit Courts of Appeal. In the present case, petitioner McDonald was a tenant in the premises searched and owned the property seized. He was of course entitled to use the corridor, and it is submitted that illegal search of the room and illegal invasion of the corridor was a plain violation of his constitutional right.

In treating a similar situation, the 3rd Circuit Court of Appeals said in *Brown, et al. v. United States*, 83 F. (2d) 383:

"The house was a private dwelling in which the proprietress with her family lived. She also kept roomers. It was not a hotel, restaurant, or public place where the public was invited or had the right to come

² *Johnson v. United States, supra.*

and go at will. Into this home the officers of the government practically forced themselves without the semblance of authority, for they did not see any crime being committed and did not even have probable cause sufficient to justify the issuance of a search warrant, or probable cause to believe that Lillian Brown had committed a felony. The existence of probable cause does not justify the search of a private dwelling without a search warrant. *Gould v. United States*, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647; *Agnello v. U. S.*, 269 U.S. 20, 32, 33, 46 S. Ct. 4, 70 L. Ed. 145, 51 A.L.R. 409; *United States v. Lefkowitz*, 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 A.L.R. 775.

"Carinelli and Neubert were roomers in the house. It was their home and so far as the unlawful search affected them, it violated their constitutional rights.

"The entrance into the house was unlawful and the officers were trespassers. As such, they had no right to make an exploratory search of every room in the house from cellar to attic, ransacking every closet, dresser drawer, or piece of clothing, obtaining the key to some of the doors of the garage by threats and breaking down others. Any evidence obtained during and by means of such search may not be used against the defendants."

Compare also *Warman v. United States*, 12 F. (2d) 775 (C.C.A. 9th), cert. denied, 273 U.S. 746; *Coan v. United States*, 36 F. (2d) 164 (C.C.A. 10th).

The dissenting opinion of the Court of Appeals in the present case reads in part as follows (R. 31):

"The question is not whether officers may look in an unconventional way into another place, from a place in which they have a right to be and in which the person who complains has no interest. The question is whether officers may look into a room from a place in which they have no right to be and in which the person who complains does have an interest; the corridor that is the only means of access to his room. A roomer's constitutional right of privacy is a fiction that keeps the word of promise to the ear and breaks it to the hope unless it includes a right not to be spied upon by

trespassers who force their way into his corridor. Yet the government contends that search by such trespassers is reasonable and the court decides that it is not a search. Neither of these propositions is comprehensible to me. No doubt a roomer's interest in a corridor is different from a householder's. Probably the one may be called an easement and the other an estate, as the government suggests. But I know of no reason why this difference should be critical here. To hold that McDonald cannot complain because he is only a roomer perverts the letter as well as the spirit of the constitutional guaranty against unreasonable searches and creates a discrimination in civil rights that is out of place in a democratic society.

It is submitted that this minority opinion is in accord with established principles of law and that the government's attempt to whittle away the protection afforded citizens under the Fourth and Fifth Amendments should not be sanctioned.

CONCLUSION.

WHEREFORE, it is respectfully submitted that the Court of Appeals for the District of Columbia committed error in affirming the judgments of conviction and that the judgments should be reversed.

Respectfully submitted:

CHARLES E. FORD,
Columbian Building,
Washington 4, D. C.

JOHN LEWIS SMITH, JR.,
729 15th St., N.W.,
Washington 5, D. C.
Attorneys for Petitioners.

APPENDIX.

The Fourth Amendment to the Federal Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Federal Constitution provides:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Title 22, Sec. 1501.—District of Columbia Code (1940 Edition) Lotteries.—Promotion—Sale or possession of tickets.

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle

him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, Sec. 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, Sec. 1.)

Title 22, Sec. 1502.—District of Columbia Code (1940 Edition) Possession of lottery or policy tickets.

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than \$500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, Sec. 2.)

Title 22, Sec. 1504.—District of Columbia Code (1940 Edition) Gaming—Setting up gaming table—Inducing play.

Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for

the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, Sec. 865)

MAY - JUN 1966
 1966
 MAY 3 1966
 MAY 3 1966
 MAY 3 1966

UNITED STATES OF AMERICA

INDEX

Opinions below	Page
Jurisdiction	1
Questions presented	1
Statement	2
Argument	2
Conclusion	5
	9

CITATIONS

Cases:

<i>Agnello v. United States</i> , 269 U. S. 20	8
<i>Brown v. United States</i> , 83 F. 2d 383	6
<i>Carralho v. United States</i> , 54 F. 2d 232	7
<i>Gibson v. United States</i> , 149 F. 2d 381, certiorari denied sub. nom. <i>O'Kelley v. United States</i> , 326 U. S. 724	5
<i>Goldstein v. United States</i> , 316 U. S. 114	5
<i>Gracie v. United States</i> , 15 F. 2d 644	7
<i>Harris v. United States</i> , 331 U. S. 145	9
<i>Hester v. United States</i> , 265 U. S. 57	7
<i>Johnson v. United States</i> , No. 329, O. T. 1947, decided Feb- ruary 2, 1948	8
<i>Mulrooney v. United States</i> , 46 F. 2d 995	7
<i>Olmstead v. United States</i> , 277 U. S. 438	7
<i>Taylor v. United States</i> , 286 U. S. 1	7
<i>United States v. Feldman</i> , 104 F. 2d 255, certiorari denied, 308 U. S. 579	7
<i>United States v. Lee</i> , 274 U. S. 559	8
Miscellaneous:	
F. R. Crim. P., Rule 41 (c)	5

(1)

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 678

EARL H. McDONALD AND JOSEPH F. WASHINGTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 28-31) have not yet been reported. The findings of fact and conclusions of law of the district court appear at pages 7-8 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered February 16, 1948 (R. 32). The petition for a writ of certiorari was filed March 16, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether gambling paraphernalia seized from McDonald's room at the time of his arrest was obtained in violation of the Fourth Amendment.

2. Whether petitioner Washington, who merely happened to be present at the time and who had no property interest either in the premises or the seized articles, is entitled to challenge the legality of the seizure.

STATEMENT

On August 26, 1946, petitioners McDonald and Washington were indicted in the United States District Court for the District of Columbia in four counts charging offenses in the carrying on of a lottery known as the numbers game, in violation of 22 D. C. Code 1501, 1502 and 1504 (R. 3-4). They waived a jury trial (R. 9) and were found guilty on all counts by the court. McDonald was sentenced to imprisonment for a term of six to eighteen months (R. 10). Washington was sentenced to imprisonment for sixty days (R. 10-11). Upon appeal to the Court of Appeals for the District of Columbia, the judgments were affirmed, one judge dissenting (R. 32).

The only issue in the case concerns the legality of the seizure of gambling paraphernalia from McDonald's room, on June 22, 1946. The facts

concerning this issue may be summarized as follows:

One Barbara Terry operates a rooming house at 1608 Third Street, N. W., in Washington, D. C. (R. 11, 15). In October 1945, petitioner McDonald, who had a home in Washington (R. 19), rented a room from her (R. 13), and this room was subsequently used for the operation of a lottery known as the numbers game (R. 18-19). McDonald was known to the Metropolitan Police as a numbers operator, and less than a year before he had been arrested at a numbers headquarters at another address. Some time prior to the arrests in question, the police received information that he had established his headquarters in his home and from the activities they observed there, they concluded that this information was correct. Before the police could act, however, McDonald moved his activities to the room in Mrs. Terry's house. (R. 21.) On several occasions, the police observed him enter the rooming house early in the afternoon and leave between 5:30 and 6:30 p. m.; the hours during which operations at the headquarters of a numbers game are customarily carried on (R. 21-22). On no occasion while the police had the rooming house under observation did McDonald remain over night (R. 22).

On June 22, 1946, during the afternoon, three police officers surrounded the rooming house. One of the officers heard a noise that sounded like a type-

writer or adding machine in operation, and he knew that adding machines are customarily used in the operation of a numbers game. McDonald had used them before in his illicit lottery activities. (R. 24-25). At this juncture, officer Ogle raised a side window facing on the porch of the house and entered through the window (R. 17). The room he entered proved to be that of Mrs. Terry, the landlady, and Ogle identified himself to her (R. 11, 15). He then opened the front and back doors of the house to admit the other two officers (R. 12, 18). The three officers searched the various rooms on the first floor and then they searched the rooms on the second floor (R. 12-13). When they reached McDonald's room at the rear of the house, they found the door locked (R. 13). Officer Ogle thereupon procured a chair and by standing on it he was able to look through a transom into the room (R. 13). He observed both petitioners in the room, as well as numbers slips, money piled on the table, and adding machines (R. 23). While still standing on the chair, Ogle called to McDonald to open the door, and McDonald did so (R. 23). Petitioners were arrested (see Pet. 3) and the officers seized the machines and papers (see R. 14, 17).

The officers did not have either a warrant of arrest or a search warrant (R. 18). They had discussed the facts they knew concerning McDonald's operations with the United States Com-

missioner, but had not obtained a warrant (R. 24, 26-27).

ARGUMENT

1. The issue here is not whether there was an illegal search of Mrs. Terry's home, but, rather, whether that search invaded the constitutional rights of either of the petitioners. It is settled law in the federal courts that one who is not the victim of an unconstitutional search or seizure has no standing to object to the introduction in evidence of that which was seized. *Goldstein v. United States*, 316 U. S. 114, 121. Both the majority and dissenting judges below recognized (R. 29, 31) that this rule forecloses petitioner Washington. For he was a stranger to the premises and the seized property and merely happened to be in McDonald's room when the arrest and seizure occurred (R. 16, 19). Indeed, in the district court, defense counsel conceded that Washington was "just a visitor" and that his constitutional rights were not infringed (see p. 12 of the stenographic transcript). It is plain, therefore, that petitioner Washington was not aggrieved by the seizure and was not entitled to have the evidence suppressed as to him. *Gibson v. United States*, 149 F. 2d 381 (App. D. C.), certiorari denied *sub. nom. O'Kelley v. United States*, 326 U. S. 724; see also Rule 41 (e), F. R. Crim. P.

2. The situation as to petitioner McDonald is somewhat different. His property was seized

from his room and if the seizure was in violation of the Fourth Amendment, he, of course, was entitled to have the evidence suppressed. It was the view of the courts below, with which we agree, that his motion to suppress was properly denied, because he was not subjected to an illegal search or seizure. The application of the rule discussed above forecloses McDonald from complaining because the police invaded the rights of Mrs. Terry, the landlady.

Brown v. United States, 83 F. 2d 383 (C. C. A. 3), cited by petitioners (Pet. 5), is not in conflict with this conclusion. In that case, the court found that the house was the home of the roomers and, implicitly, that a search of the house, apparently including their rooms, invaded their rights. In this case, the evidence shows that petitioner McDonald had an interest only in his own room, which was used as a headquarters for the conduct of a lottery. His home was at another place. The search of Mrs. Terry's room and the rooms of other roomers could not in any realistic sense have constituted an invasion of McDonald's rights. He had no interest in or right to enter the other rooms in the house (see, e. g., R. 16).

The critical question is whether any of McDonald's rights were invaded. It cannot be denied that the officers gained access to the hallway in front of the door to McDonald's room by means of a trespass into Mrs. Terry's rooming house.

But the prohibition of the Fourth Amendment is not against trespassing; it is against unreasonable searches or seizures. Thus, unless there was an illegal search affecting McDonald, the fact that the police were trespassers in the house does not aid him. *Hester v. United States*, 265 U. S. 57; see *Olmstead v. United States*, 277 U. S. 438, 465.

In our view, McDonald was not subjected to an unlawful search or seizure. Before the police entered his room, one of them merely looked through the transom and observed what was open to view. To see what is visible to the eye is not to search within the meaning of the Fourth Amendment. In *Olmstead v. United States*, 277 U. S. 438, 465, this Court said that even a liberal construction of the Fourth Amendment could not extend "the words search and seizure as to forbid hearing or sight." Thus, police have obtained knowledge of the commission of a crime by looking through windows (*Carvalho v. United States*, 54 F. 2d 232 (C. C. A. 1); *United States v. Feldman*, 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579), through a crack in a door (*Gracie v. United States*, 15 F. 2d 644 (C. C. A. 1)), and through a transom (*Mulrooney v. United States*, 46 F. 2d 995 (C. C. A. 4)). In none of these cases was it even suggested that such means of detecting crime by observation from a vantage point constitute a search. In *Taylor v. United States*, 286 U. S. 1, this Court said, without suggesting that a search had occurred at

that point, that with the knowledge the agents obtained by looking through a small opening and smelling the odor of the whiskey, they had probable cause for obtaining a search warrant. See *Johnson v. United States*, No. 329, O. T. 1947, decided February 2, 1948.¹ And in *Agnello v. United States*, 269 U. S. 20; this Court approved a search and seizure where the arresting officers looking through a window of a home saw what appeared to be an illicit transaction and then "rushed in and arrested all the defendants" (269 U. S. at 28-30). *United States v. Lee*, 274 U. S. 559, 563, where a search light was used to observe what was on a boat, is another illustration of the recognition by this Court of the fact that to see is not to search within the meaning of the Fourth Amendment. Accordingly, we submit that when officer Ogle looked through the transom of petitioner McDonald's room, he did not search it.

It is true that there was a seizure thereafter, but it was not an unreasonable one. When McDonald unlocked his door and admitted the officers, he and his codefendant were arrested (see Pet. 3) and the numbers slips, adding machines, and money were seized. These, of course, were

¹ The present case is unlike *Johnson's* in that from their point of observation outside the room, the officers perceived both the crime and the offenders; the identity of the offenders was known before the officers entered the room. Thus, the entry into the room did not contribute to their knowledge of the crime being committed in their presence. In this aspect, the case is like *Agnello's*, cited in the text.

the instrumentalities of the crimes for which petitioners were arrested and convicted, and, as an incident to the valid arrest,² it was proper to seize them, even without a warrant. *Harris v. United States*, 331 U. S. 145.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied both as to petitioner Washington and petitioner McDonald.

PHILIP B. PERLMAN,
Solicitor General.

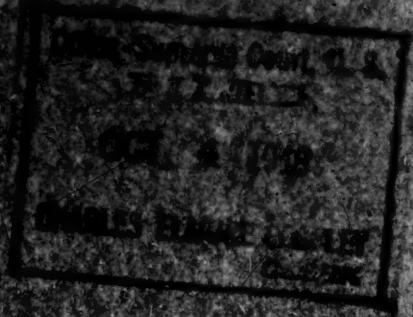
T. VINCENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
Attorney.

APRIL 1948.

² With the knowledge officer Ogle obtained by looking through the transom, it is plain that he had probable cause for believing that an offense was then being committed, and he was thus justified in making the arrest without a warrant. In this respect, it is interesting to note that one of the officers testified that in his experience with violations of the character involved here, "if we leave the premises and go to the United States Commissioner's Office, when we return to the premises, I will say in 99 percent of the cases, there will be nothing there" (R. 26).

LIBRARY
SUPREME COURT, U.S.



No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1942

EARL B. MCDONALD and JOSEPH E. WASHINGTON,
PETITIONERS

UNITED STATES OF AMERICA

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA

VERSUS THE UNITED STATES

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes involved.....	2
Statement.....	2
Summary of argument.....	5
Argument:	
I. Only the victim of an illegal search has standing to object to the admission of illegally seized evidence.....	8
A. Since Fourth Amendment rights are personal, only the person whose rights have been violated has standing to assert them.....	8
B. Petitioner Washington, who had no interest in the premises searched or the property taken, has no standing to have the seized evidence suppressed as to him.....	14
C. Petitioner McDonald is not entitled to attack the officers' entry into Mrs. Terry's house.....	16
II. The seizure from McDonald's room of the instrumentalities of a crime committed in the presence of the officers was proper under the Fourth Amendment.....	19
A. The act of observing petitioner through the transom of his room did not constitute a search within the meaning of the Fourth Amendment.....	19
B. As incident to petitioner's arrest for a crime committed in their presence, the officers had the right to seize the instrumentalities of the crime.....	21
Conclusion.....	25
Appendix.....	26

CITATIONS

Cases:

<i>Agnello v. United States</i> , 269 U. S. 20.....	9, 20
<i>Allman v. State</i> , 107 Tex. Cr. 439.....	18
<i>Banks v. Farwell</i> , 21 Pick. 156.....	22
<i>Brown v. United States</i> , 83 F. 2d 383.....	18
<i>Bushouse v. United States</i> , 67 F. 2d 843.....	10
<i>Carroll v. United States</i> , 267 U. S. 132.....	22

Cases—Continued

	Page
<i>Carvalho v. United States</i> , 54 F. 2d 232	20
<i>Chicco v. United States</i> , 284 Fed. 434	10
<i>Connally v. Medalie</i> , 58 F. 2d 629	11, 13
<i>Coon v. United States</i> , 36 F. 2d 164	17
<i>Entick v. Carrington</i> , 19 How. St. Trials 1029	18
<i>Gibson v. United States</i> , 149 F. 2d 381, certiorari denied <i>sub nom. O'Kelley v. United States</i> , 326 U. S. 724	10, 11
<i>Go-Bart Co. v. United States</i> , 282 U. S. 344	22
<i>Goldberg v. United States</i> , 297 Fed. 98	10
<i>Goldstein v. United States</i> , 316 U. S. 114	5, 9, 10, 13
<i>Gracie v. United States</i> , 15 F. 2d 644	20
<i>Grainger v. United States</i> , 158 F. 2d 236	10, 11
<i>Hale v. Henkel</i> , 201 U. S. 43	14
<i>Hall v. United States</i> , 150 F. 2d 281, certiorari denied, 326 U. S. 741	10
<i>Harris v. United States</i> , 331 U. S. 145	7, 22
<i>Hester v. United States</i> , 265 U. S. 57	16
<i>Houghton v. Bachman</i> , 47 Barb. 388	22
<i>Johnson v. United States</i> , 333 U. S. 10	21
<i>Kelleher v. United States</i> , 35 F. 2d 877	12
<i>Kelley v. United States</i> , 61 F. 2d 843	11
<i>Kneeland v. Connally</i> , 70 Ga. 424	22
<i>Kwong How v. United States</i> , 71 F. 2d 71	11
<i>Lagow v. United States</i> , 159 F. 2d 245, certiorari denied, 331 U. S. 858	10, 11
<i>Lefkowitz v. United States</i> , 285 U. S. 452	22
<i>Lusco v. United States</i> , 287 Fed. 69	10
<i>McMillan v. United States</i> , 26 F. 2d 58	11
<i>Marron v. United States</i> , 275 U. S. 192	22
<i>Mello v. United States</i> , 66 F. 2d 135	11
<i>Milyonico v. United States</i> , 53 F. 2d 937, certiorari denied, 286 U. S. 551	18
<i>Morgan v. Halberstadt</i> , 60 Fed. 592, certiorari denied, 154 U. S. 511	14
<i>Moy Wing Sun v. Prentis</i> , 234 Fed. 24	10
<i>Mulrooney v. United States</i> , 46 F. 2d 995	21
<i>Nasetta, In re</i> , 125 F. 2d 924	11
<i>Newingham v. United States</i> , 4 F. 2d 490, certiorari denied, 268 U. S. 703	11
<i>Olmstead v. United States</i> , 277 U. S. 438	7, 20
<i>Safarik v. United States</i> , 62 F. 2d 892, rehearing denied, 63 F. 2d 369	17
<i>Shields v. United States</i> , 26 F. 2d 993	12
<i>Shore v. United States</i> , 49 F. 2d 519, certiorari denied, 283 U. S. 865	17
<i>State v. Robbins</i> , 124 Ind. 308	22
<i>Taylor v. United States</i> , 286 U. S. 1	20
<i>Trupiano v. United States</i> , 334 U. S. 699	7, 21, 23
<i>Tsue Shee v. Backus</i> , 243 Fed. 551	10

Cases—Continued

	Page
<i>United States v. DeVasto</i> , 52 F. 2d 26, certiorari denied, 284 U. S. 678	11, 17
<i>United States v. Feldman</i> , 104 F. 2d 255, certiorari denied, 308 U. S. 579	20
<i>United States v. Lee</i> , 274 U. S. 559	20, 22
<i>United States v. Mills</i> , 185 Fed. 318	12
<i>United States v. Mitchell</i> , 322 U. S. 65	14
<i>United States v. Muscarelle</i> , 63 F. 2d 806, certiorari denied, 290 U. S. 642	11, 17
<i>Ward v. State</i> , 40 Okla. Cr. 377	18
<i>Weeks v. United States</i> , 232 U. S. 383	7, 10, 12, 22
<i>Whitlock v. State</i> , 123 Tex. Cr. 279	18
<i>Wilson v. United States</i> , 221 U. S. 361	14
<i>Winslett v. United States</i> , 43 F. 2d 358	10
Statutes and Constitution:	
Fourth Amendment	16
District of Columbia Code:	
§4-140	21, 26
§4-143	21, 26
§22-1501	26
§22-1502	27
§22-1504	28

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 36

EARL H. McDONALD AND JOSEPH F. WASHINGTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 28-31) are reported at 166 F. 2d 957. The findings of fact and conclusions of law of the district court (R. 7-8) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 16, 1948 (R. 32). The petition for a writ of certiorari was filed March 16, 1948, and certiorari was granted on April 19, 1948

(R. 34). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U. S. C. 1254). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner Washington, who merely happened to be present at the time property was seized from petitioner McDonald's room and who had no proprietary interest either in the premises or the seized articles, is entitled to challenge the validity of the seizure.

2. Whether petitioner McDonald has standing to challenge the legality of the means by which officers gained access to the hallway of a rooming house in which he rented a room.

3. Whether, incident to the arrest of petitioner McDonald for a crime observed by the officers by looking through the transom of McDonald's room, the officers had power to seize instrumentalities of the crime open to view.

STATUTES INVOLVED

The pertinent provisions of the District of Columbia Code appear in the Appendix *infra*, pp. 26-28.

STATEMENT

On August 26, 1946, petitioners McDonald and Washington were indicted in the United States District Court for the District of Columbia in

four counts charging offenses in the carrying on of a lottery known as the numbers game, in violation of 22 D. C. Code 1501, 1502, and 1504 (R. 3-4). They waived a jury trial (R. 9) and were found guilty on all counts by the court. McDonald was sentenced to imprisonment for a term of six to eighteen months (R. 10). Washington was sentenced to imprisonment for sixty days (R. 10-11). Upon appeal to the Court of Appeals for the District of Columbia, the judgments were affirmed, one judge dissenting (R. 32).

The only issue in the case concerns the legality of the seizure of gambling paraphernalia from McDonald's room on June 22, 1946. The facts concerning this issue may be summarized as follows:

One Barbara Terry operates a rooming house at 1608 Third Street, N.W., in Washington, D. C. (R. 11, 15). In October 1945, petitioner McDonald, who had a home in Washington (R. 19), rented a room from her (R. 13), and this room was subsequently used for the operation of a lottery known as the numbers game (R. 18-19).

McDonald was known to the Metropolitan Police as a numbers operator, and less than a year before he had been arrested at a numbers headquarters at another address. Some time prior to the arrests in question, the police received information that he had established his headquarters in his home and from the activities

they observed there, they concluded that this information was correct. (R. 21.)

Before the police could act, however, McDonald moved his activities to the room in Mrs. Terry's house (R. 21). On several occasions, the police observed him enter the rooming house early in the afternoon and leave between 5:30 and 6:30 p. m., the hours during which operations at the headquarters of a numbers game are customarily carried on (R. 21-22). On no occasion while the police had the rooming house under observation did McDonald remain over night (R. 22).

On June 22, 1946, during the afternoon, three police officers surrounded the rooming house. One of the officers heard a noise that sounded like a typewriter or adding machine in operation, and he knew that adding machines are customarily used in the operation of a numbers game. McDonald had used them before in his illicit lottery activities (R. 24-25). At this juncture, officer Ogle raised a side window facing on the porch of the house and entered through the window (R. 17). The room he entered proved to be that of Mrs. Terry, the landlady, and Ogle identified himself to her (R. 11, 15). He then opened the front and back doors of the house to admit the other two officers (R. 12, 18). The three officers searched the various rooms on the first floor and then they searched the rooms on the second floor (R. 12-13).

When they reached McDonald's room at the

rear of the house, they found the door locked (R. 13). Officer Ogle thereupon procured a chair and by standing on it he was able to look through a transom into the room (R. 13). He observed both petitioners in the room, as well as numbers slips, money piled on the table, and adding machines (R. 23). While still standing on the chair, Ogle called to McDonald to open the door, and McDonald did so (R. 23). Petitioners were arrested (see Pet. 3) and the officers seized the machines and papers (see R. 14, 17).

The officers did not have either a warrant of arrest or a search warrant (R. 18). They had discussed with the United States Commissioner the facts which they knew concerning McDonald's operations before they actually observed him, but had not obtained a warrant (R. 24, 26-27).

SUMMARY OF ARGUMENT

I. It is settled law in the federal courts that, since the rights guaranteed by the Fourth Amendment are personal, they can be asserted only by the person whose rights have been violated. *Goldstein v. United States*, 316 U. S. 114, 121. Basically, this rule rests on the theory that the suppression of evidence wrongfully seized is a method of vindicating a constitutional right and not the means of disciplining police officers. Suppression is, essentially, a remedial measure, not a punitive one. Since the right protected, the right

to privacy, is a personal one, the punitive effect of the rule requiring suppression is enforced only to the extent that the constitutional right of the person before the court has been invaded.

Applying this rule to the instant case, it is clear that petitioner Washington has no standing to have the evidence seized by the police officers suppressed as to him. He was a stranger to the premises who happened to be in McDonald's room when the arrest and seizure occurred, and he had no property interest in the objects taken.

By the same token, petitioner McDonald has no standing to complain of the illegal act of the police officers in entering Mrs. Terry's rooming house and gaining access to the hallway. Although that act of entry was a trespass, it was not a trespass which violated McDonald's rights under the Fourth Amendment. Hence, he cannot rely on that trespass to make out a violation of his constitutional rights.

The fact that McDonald had the right to use the entrance and the hallway leading to his room did not confer upon him sufficient interest in the premises to enable him to claim the protection of the Fourth Amendment with respect thereto. He had no control over that area and was not in a position to determine who should or should not be allowed access thereto. Hence, the entrance and hallway were not private premises in relation to McDonald, and a trespass on those premises was not a violation of his right of privacy.

II. So far as the constitutional rights of McDonald are concerned, the only significant facts are that the officers, looking through a transom into his room; observed him in the act of committing an offense; then obtained entrance to the room for the purpose of arresting him; and seized as incident to the arrest the instrumentalities of the crime which had just been committed. There was no search; merely the seizure of equipment open to view.

The act of the officers in observing McDonald through the transom was not a search. The words search and seizure cannot be extended "as to forbid hearing or sight." *Olmstead v. United States*, 277 U. S. 438, 465.

Having observed petitioner in the act of committing an offense, the police officers were then and there under a duty to arrest him. 4 D. C. Code 140. Before they entered McDonald's room, they had identified both the crime and the offender. The entry was therefore a proper entry for the purpose of arresting petitioner.

As incident to the arrest, the officers had the right to seize the instrumentalities of the crime open to view. That right has been upheld in numerous state and federal decisions, including most of the major decisions of this Court relating to search and seizure from *Weeks v. United States*, 232 U. S. 383, through *Harris v. United States*, 331 U. S. 145. We do not understand the decision of this Court in *Trupiano v. United*

States, 334 U. S. 699, to have changed that rule as applied to a situation where officers had neither time nor information to get a warrant.

Here the officers did not have sufficient information to get a search warrant until they saw petitioner committing an offense. After they saw him, they had no time to get a warrant because there was a real possibility that petitioner, who did not live at the rooming house, would have departed with much of the incriminating evidence. An immediate arrest was required, both by statute and by factual realities.

After the arrest, any attempt to take control of the property would be a seizure, even if one officer remained on guard while another sought a warrant. If the officers had authority to seize at all, no reason exists why they should not have taken the property with them when they took the offender to the police station. The entry was lawful, there was no search, and the property seized was property which petitioner did not rightfully own. A seizure under such circumstances is a reasonable seizure under the Fourth Amendment.

ARGUMENT

I

ONLY THE VICTIM OF AN ILLEGAL SEARCH HAS STANDING TO OBJECT TO THE ADMISSION OF ILLEGALLY SEIZED EVIDENCE

A. Since Fourth Amendment rights are personal, only the person whose rights have been

violated has standing to assert them.—It is settled law in the federal courts that, since the rights guaranteed by the Fourth Amendment are personal, they can be asserted only by the person whose rights have been violated. This Court recognized the force of this rule and applied the same principle in *Goldstein v. United States*, 316 U. S. 114, when it held that one not a party to unlawfully intercepted communications could not object to the introduction of evidence obtained as the result of illegal wire tapping. This Court there said, at p. 121:

* * * While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized. * * * We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act. * * *

See, also, *Agnello v. United States*, 269 U. S. 20, where this Court allowed the judgment against Agnello's codefendants to stand despite the reversal as to Agnello because of the admission of evidence illegally seized from his home. While in that case it appeared that the illegally seized evidence had not been introduced against the codefendants, it is significant that, in affirming the

judgment as to the codefendants, this Court said at page 35: "The introduction of the evidence of the search and seizure did not transgress their constitutional rights."

As this Court recognized in the *Goldstein* case, the rule that only the victim of an illegal search has standing to complain has been universally applied in the lower federal courts from the period when this Court's decision in *Weeks v. United States*, 232 U. S. 383, first outlawed illegally seized evidence¹ until the present.²

It has been applied with logical consistency in many different factual situations. Thus, for example, it has been held, not only that one with no interest in the premises searched or property taken, who was not present at the time of search, has no standing to complain,³ but that a person

¹ For earlier cases applying the rule, see *Moy Wing Sun v. Prentiss*, 234 Fed. 24, 26 (C. C. A. 7); *Tsue Shee v. Backus*, 243 Fed. 551, 552 (C. C. A. 9); *Chicco v. United States*, 284 Fed. 434, 436-437 (C. C. A. 4); *Lusco v. United States*, 287 Fed. 69, 70 (C. C. A. 2); *Goldberg v. United States*, 297 Fed. 98, 101 (C. C. A. 5).

² For recent decisions applying the same rule, see *Lagow v. United States*, 159 F. 2d 245, 246 (C. C. A. 2), certiorari denied, 331 U. S. 858; *Grainger v. United States*, 158 F. 2d 236, 237 (C. C. A. 4); *Hall v. United States*, 150 F. 2d 281, 283 (C. C. A. 5), certiorari denied, 326 U. S. 741; *Gibson v. United States*, 149 F. 2d 381, 384 (App. D. C.), certiorari denied *sub nom.* *O'Kelley v. United States*, 326 U. S. 724.

³ E. g., *Hall v. United States*, 150 F. 2d 281, 283 (C. C. A. 5), certiorari denied, 326 U. S. 741; *Bushouse v. United States*, 67 F. 2d 843, 844 (C. C. A. 6); *Wynslett v. United States*, 43 F. 2d 358, 359 (C. C. A. 10).

actually present at the time of search, who has no interest in the premises or property, is in the same position.⁴ On this basis, employees working at the place where property is seized and apparently in control thereof cannot attack the validity of a search and seizure since they have no property interest in the seized objects.⁵ This rule applies to stockholders and officers of a corporation,⁶ even where the person seeking the return of seized property is the sole stockholder.⁷ In fact, even where property is taken from a person claimed by the Government to be the owner, if that person disclaims such ownership, he cannot assert that his rights have been violated, the courts holding him to the choice of "one horn of the dilemma."⁸

To some extent, the rule probably arises from the fact that motions to suppress originated as

⁴ E. g., *Gibson v. United States*, 149 F. 2d 381, 384 (App. D. C.), certiorari denied *sub nom. O'Kelley v. United States*, 326 U. S. 724; *In re Nasetta*, 125 F. 2d 924, 925 (C. C. A. 2); *Kwong How v. United States*, 71 F. 2d 71, 75 (C. C. A. 9).

⁵ E. g., *United States v. Muscarelle*, 63 F. 2d 806 (C. C. A. 2), certiorari denied, 290 U. S. 642; *Mello v. United States*, 66 F. 2d 135, 136 (C. C. A. 3); *Kelley v. United States*, 61 F. 2d 843, 845 (C. C. A. 8).

⁶ E. g., *United States v. DeVasto*, 52 F. 2d 26, 29 (C. C. A. 2), certiorari denied, 284 U. S. 678; *Newingham v. United States*, 4 F. 2d 490, 493 (C. C. A. 3), certiorari denied, 268 U. S. 703.

⁷ *Lagow v. United States*, 159 F. 2d 245, 246 (C. C. A. 2), certiorari denied, 331 U. S. 858.

⁸ *Connally v. Medalie*, 58 F. 2d 629, 630 (C. C. A. 2); see also *Grainger v. United States*, 158 F. 2d 236, 237 (C. C. A. 4); *McMillan v. United States*, 26 F. 2d 58, 59-60 (C. C. A. 8).

2

actions to compel the return of property wrongfully seized. E. g., *Weeks v. United States*, 232 U. S. 383; *United States v. Mills*, 185 Fed. 318 (C. C. S. D. N. Y.). Manifestly, a person has no standing to seek the return of property in which he has no proprietary or possessory interest. For example, in the case of *Shields v. United States*, 26 F. 2d 993, 996 (App. D. C.), the court said:

Nowhere in this petition is it alleged that any of the property seized is claimed to be the property of the petitioner, nor does he ask for its return to him. Clearly, to be entitled to its return, he must assert an interest in it. * * *

Or, as the Court phrased it in *Kelley v. United States*, 35 F. 2d 877, 879 (App. D. C.), one without interest in the property is not entitled "to ask for the return of the property to a third person."

The rule has, however, a broader and a firmer base. Essentially, it rests on the theory that the suppression of evidence wrongfully seized is a method of vindicating a constitutional right, and not a means of disciplining police officers. Suppression is a remedial measure, not a punitive one. Since the right protected—the right to privacy—is a personal one, the punitive effect of the rule requiring suppression is enforced only to the extent that the constitutional right of the person before the court has been invaded. As the Circuit Court of Appeals for the Second Circuit,

speaking through Judge Learned Hand, said in *Connally v. Medalie*, 58 F. 2d 629, 630:

* * * The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means to conviction. The relief being thus remedial, the evidence has never been thought incompetent against anyone but the victim. Conceivably it might have been; it might have been held that the prosecution, though not disqualified from taking advantage of another's wrong (*Burdeau v. McDowell*, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159), should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless. * * *

The principle that only the person who has the privilege may assert it has been applied in other situations. As noted above, this Court, on the authority of the Fourth Amendment cases, held that only the person whose privacy had been violated had the right to complain of illegal wire tapping. *Goldstein v. United States*, 316 U. S. 114. With respect to the privilege against self-incrimination, if a witness waives his privilege or

the court requires him to answer, a party to the action has no right to interfere or to complain of the answer. *Morgan v. Halberstadt*, 60 Fed. 592, 596-597 (C. C. A. 2), certiorari denied, 154 U. S. 511. Cf. *Hale v. Henkel*, 201 U. S. 43; *Wilson v. United States*, 221 U. S. 361. Certainly a person incriminated by documents held by another would have no standing to enter objection if the owner of the documents chose to waive his constitutional right of privacy and turn the documents over to the Government. No more should a defendant rightfully before the court escape just punishment because the constitutional rights of some other person have been wrongfully invaded.

The rule requiring suppression of evidence is an exception to the general principle that relevant evidence will be considered no matter how it was obtained. The exception has never been extended beyond the point necessary to protect the person whose rights have been violated. As this Court said in another context in *United States v. Mitchell*, 322 U. S. 65, 70-71, when it held that subsequent illegal conduct by police officers did not vitiate a valid confession previously obtained:

* * * Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.

B. *Petitioner Washington, who had no interest in the premises searched or the property taken,*

has no standing to have the seized evidence suppressed as to him.—Applying the rule discussed above, that only a person whose constitutional rights have been invaded has the right to have illegally seized evidence suppressed, it is clear that, as both the majority and dissenting judges below agreed (R. 29, 31), petitioner Washington has no standing to have the evidence seized by the police officers suppressed as to him. He was a stranger to the premises, who happened to be in McDonald's room when the arrest and seizure occurred, and he had no property interest in the objects taken (R. 16, 19). As indicated above, the decisions uniformly hold that such a person, whose constitutional rights have not been infringed, has no standing to have evidence suppressed.

Nor is there any possibility of prejudice to petitioner Washington by reason of the fact that he was jointly tried with petitioner McDonald, assuming that as to McDonald the evidence was wrongfully admitted. If the evidence was admissible against Washington at all, it would have exactly the same effect in establishing his guilt whether he was tried alone or with someone else. The exclusion of the seized evidence as to McDonald would not in any way affect the judgment as to Washington. His attorney conceded at the trial that if he was wrong on the law, i. e., wrong as to his motion for suppression, his client was guilty (Transcript of Trial p. 16).⁹

⁹ On file with the Clerk of this Court.

C. Petitioner McDonald is not entitled to attack the officers' entry into Mrs. Terry's house.—

As to petitioner McDonald, he does of course have standing to attack the entry into his room and the seizure of the property in his possession if such entry and seizure were illegal. However, again applying the rule discussed in Point A above, McDonald has no standing to complain of the illegal act of the police officers in entering Mrs. Terry's rooming house and gaining access to the hallway. That act of entry was a trespass, but it was not a trespass which violated McDonald's rights under the Fourth Amendment. He, therefore, cannot rely on that trespass to make out a violation of his constitutional rights which would give him the right to have evidence suppressed.

In *Hester v. United States*, 265 U. S. 57, this Court held that a trespass on land owned by the person claiming to be the victim of an illegal search could not be deemed the beginning of a search, since the land was not an area within the protection of the Fourth Amendment. As far as a particular defendant before the court is concerned, the home or effects of some other person is no more within the area which the Fourth Amendment protects as to him than is the land around his own home. Hence, applying the rule that only the person whose rights have been in-

fringed has standing to assert them, the courts have consistently ruled that a trespass on the land or a wrongful search of the property of another, even where the trespass may be a violation of the Fourth Amendment as to such other person, cannot be availed of by a person whose own constitutional rights have not been invaded, although the trespass precedes the search complained of. *Safarik v. United States*, 62 F. 2d 892, 895, rehearing denied, 63 F. 2d 369 (C. C. A. 8); *United States v. De Vasto*, 52 F. 2d 26, 29 (C. C. A. 2), certiorari denied, 284 U. S. 678; *Shore v. United States*, 49 F. 2d 519, 521-522 (App. D. C.), certiorari denied, 283 U. S. 865; *Coon v. United States*, 36 F. 2d 164 (C. C. A. 10); see also *United States v. Muscarelle*, 63 F. 2d 806 (C. C. A. 2), certiorari denied, 290 U. S. 642.

The dissenting opinion below, although recognizing the force of the rule, seeks to escape from its logic by taking the position that petitioner, as lessee of a room in Mrs. Terry's home, had such an interest in the hallway leading to his room, that the forcible entry therein was a forcible intrusion on his privacy (R. 31). Petitioner did, of course, have the right to use the entrance and hallway to get to his room, but we do not believe that such right can be deemed to confer upon him sufficient interest in those premises for him to be able to claim the protection of the Fourth Amendment with respect thereto. Petitioner had

no control over the hallway or entrance. He was not in a position to determine whether the door should be kept open or locked. He was not in a position to determine whether any individual should or should not have access thereto. Had Mrs. Terry voluntarily opened the door for the police officers, petitioner's objection to their entry could not have overridden her consent. See *Milyonico v. United States*, 53 F. 2d 937 (C. C. A. 7), certiorari denied, 286 U. S. 551. Hence the entrance and the hallway were not private premises in relation to petitioner, and a trespass on those premises was not a violation of petitioner's right of privacy. See *Ward v. State*, 40 Okla. Cr. 377, holding that one employed and living in a rooming house had no interest which would entitle him to complain of an illegal entry to the hallway; *Allman v. State*, 107 Tex. Cr. 439, holding that the interest of a person renting a room did not extend beyond his room; *Whitlock v. State*, 123 Tex. Cr. 279, holding that a bathroom controlled by the landlady and used by a tenant was not an area protected as to the tenant.

Brown v. United States, 83 F. 2d 383 (C. C. A. 3), relied upon by petitioner (Br. 7-8), is not to the contrary, for there the rooms of the tenants were apparently searched. It is not questioned that here petitioner does have standing to complain of a search of his room if there was a search which was improperly conducted. We discuss that question

in Point II, *infra*. As to the entrance into the hallway, however, the important point is that petitioner had no dominion or control over that area and therefore has no standing to complain of any illegal act in that area. Not until the officers reached petitioner's room was petitioner in the position to invoke his constitutional rights under the Fourth Amendment with respect to their acts.

II

THE SEIZURE FROM McDONALD'S ROOM OF THE INSTRUMENTALITIES OF A CRIME COMMITTED IN THE PRESENCE OF THE OFFICERS WAS PROPER UNDER THE FOURTH AMENDMENT

Considered in relation to the constitutional rights of petitioner McDonald, the following facts only are significant: From the hallway outside of petitioner's room, officers, looking through a transom, observed petitioner in the act of committing an offense. They obtained entrance to the room by force of their office, arrested petitioner, and seized the instrumentalities of the crime which they had just seen being committed. The question is whether on those facts alone the seizure here involved is lawful. We submit that it was.

A. *The act of observing petitioner through the transom of his room did not constitute a search within the meaning of the Fourth Amendment.*—To see what is visible to the eye is not a search within the meaning of the Fourth Amendment. In the famous case of *Entick v. Carrington*, 19

How. St. Tr. 1029, the court in the course of its opinion stated (at p. 1066), "the eye cannot by the laws of England be guilty of a trespass." The same thought was expressed by this Court in *Olmstead v. United States*, 277 U. S. 438, 465, when it ruled that even a liberal construction of the Fourth Amendment could not extend "the words search and seizure as to forbid hearing and sight."

In *Agnello v. United States*, 269 U. S. 20, 28-30, this Court approved a search and seizure made after arresting officers had observed an illicit transaction through the window of a home and had then "rushed in and arrested all the defendants." In *Taylor v. United States*, 286 U. S. 1, this Court said, without suggesting that a search had occurred at that point, that with the knowledge the agents had obtained by looking through a small opening and smelling the odor of whiskey, they had probable cause for obtaining a search warrant. In *United States v. Lee*, 274 U. S. 559, 563, this Court upheld a search following the observation of illegal conduct by throwing a searchlight on a boat. Similarly, lower federal courts have upheld searches where police obtained knowledge of the commission of a crime by looking through windows (*Carvalho v. United States*, 54 F. 2d 232 (C. C. A. 1); *United States v. Feldman*, 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579), through a crack in a door (*Gracie*

v. *United States*, 15 F. 2d 644 (C. C. A. 1)), and through a transom (*Mulrooney v. United States*, 46 F. 2d 995 (C. C. A. 4)). In none of these cases was it even suggested that such means of detecting crime by observation from a vantage point constituted a search. Accordingly, when the officers looked through the transom into petitioner McDonald's room, they did not search his room.

B. *As incident to petitioner's arrest for a crime committed in their presence, the officers had the right to seize the instrumentalities of the crime.*— Having observed petitioner in the act of committing an offense, the police officers were under a duty then and there to arrest him. See 4 D. C. Code 140, 143, *infra*, p. 26. The situation here is unlike that before this Court in *Johnson v. United States*, 333 U. S. 10, cited by petitioners (Br. 6), for here, before the officers entered the room, they had identified both the crime and the offender. Although the entry into McDonald's room was made under color of office, the entry was for the proper purpose of arresting petitioners, an entry not only authorized but required by statute.

As incident to that arrest, the officers seized the instrumentalities of the crime which they had just seen being committed. There was no search, merely the seizure of the equipment which was open to view. In the Government's Brief in the case of *Trupiano v. United States*, 334 U. S. 699 (No. 427, Oct. T. 1947), we set forth at pages 25

to 32, the long unbroken line of reported decisions in state, federal and English courts, including the numerous decisions of this Court, which have recognized and upheld seizures incident to arrest of the instrumentalities of a crime open to view at the place where the crime was committed. Such seizures were upheld in early state decisions preceding the *Weeks* rule. *Banks v. Farwell*, 21 Pick. 156 (Mass. 1839); *Houghton v. Bachman*, 47 Barb. 388 (N.Y. 1866); *Kneeland v. Connally*, 70 Ga. 424, 425 (1883); *State v. Robbins*, 124 Ind. 308, 311 (1890). The right to seize was recognized and where necessary upheld in almost every important search and seizure decision by this Court from *Weeks v. United States*, 232 U. S. 383, 392, through *Harris v. United States*, 331 U. S. 145, 150-151. See dissenting opinions in that case at pp. 169, 186.⁹ As the Georgia court said in the early case of *Kneeland v. Connally*, *supra*, a case involving the seizure of gaming equipment (70 Ga. at 425):

* * * The warrant to seize the keeper of the unlawful house or room carries with it the power or legal authority to seize the implements of his crime, just as a warrant to arrest a man charged with murder would

⁹ See also *Carroll v. United States*, 267 U. S. 132, 158; *Agnello v. United States*, 269 U. S. 20, 30; *United States v. Lee*, 274 U. S. 559, 563; *Marron v. United States*, 275 U. S. 192, 198-199; *Go-Bart Co. v. United States*, 282 U. S. 344, 358; *Lefkowitz v. United States*, 285 U. S. 452, 465.

carry with it authority to seize the bloody knife or smoking pistol which killed, or a warrant to arrest a counterfeiter would include the legal seizure of his tools for counterfeiting. No separate warrant is necessary in either case.

We do not understand the *Trupiano* decision to have changed that rule as applied to a situation like that presented here, where officers had neither time nor information to obtain a search warrant before the arrest and seizure were made.

The officers could not have obtained a search warrant before they observed petitioner through the transom of his room. The record shows that they had discussed with the United States Commissioner the information which they had before they actually observed the offense, and presumably the Commissioner had not deemed that information sufficient to constitute probable cause for the issuance of a warrant. Hence, not until they actually saw McDonald committing an offense, i. e., not until they had information which required the immediate arrest of petitioner, did they have sufficient information to obtain a search warrant.

The officers had no time to obtain a search warrant after they observed the offense before they arrested petitioners. One of the officers testified in this case that it was his experience with violations of this character that "if we leave the premises and go to the United States Commis-

sioner's Office, when we return to the premises, I will say in 99 percent of the cases, there will be nothing there" (R. 26). The necessity for immediate action was particularly great here since McDonald did not live at the rooming house. There was a strong probability, almost a certainty, that, had the arrest been delayed until a search warrant could be obtained, McDonald would have departed for the day and that much of the significant evidence, the tickets and money, would have disappeared. An immediate arrest was required, both by statute and by factual realities.

After the officers had arrested petitioner, they would, we submit, have been derelict in their duty had they left the room without taking the contraband property with them. Certainly, if they had left it unguarded, there was real danger that someone might remove the property. Conceivably, since the arrest happened to be made by more than one person, one officer could have remained on guard while another went to get a warrant. If in the meantime, however, some person had tried to remove that property, the officer on guard would have been required to use the force of his office to prevent removal thereof. The mere standing on guard over the property would itself be a seizure. Hence, if the officers had the right to take control of the property—and, we submit, officers must have that right under circumstances such as are presented

in this case—then we do not see how any constitutional principles are vindicated by requiring what is in effect a double seizure instead of allowing the officers to take the property with them at the time they take the prisoner into custody.

The seizure of the instrumentalities of crime incident to a lawful arrest, where the seizure is made at the place where the offense has been committed and where the instrumentalities of the crime are open to view, involves no element of an invasion of the right to privacy. The entry is lawful, there is no search, and the property taken is property which the defendant cannot rightfully own. That kind of a seizure has been recognized since the time of the adoption of the Fourth Amendment. It is therefore a reasonable seizure under the Fourth Amendment.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

PHILIP B. PERLMAN,

Solicitor General.

ALEXANDER M. CAMPBELL,

Assistant Attorney General.

FREDERICK BERNAYS WIENER,

Special Assistant to the Attorney General.

ROBERT S. ERDAHL,

BEATRICE ROSENBERG,

Attorneys.

OCTOBER 1948.

APPENDIX

The pertinent provisions of the District of Columbia Code are as follows:

§ 4-140. The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

* * * * *

§ 4-143. If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District jail or penitentiary not exceeding two years, or by a fine not exceeding \$500.

* * * * *

§ 22-1501. If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any

chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

§ 22-1502. If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than \$500 or be imprisoned for not more than six months, or both.

§ 22-1504. Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years.

